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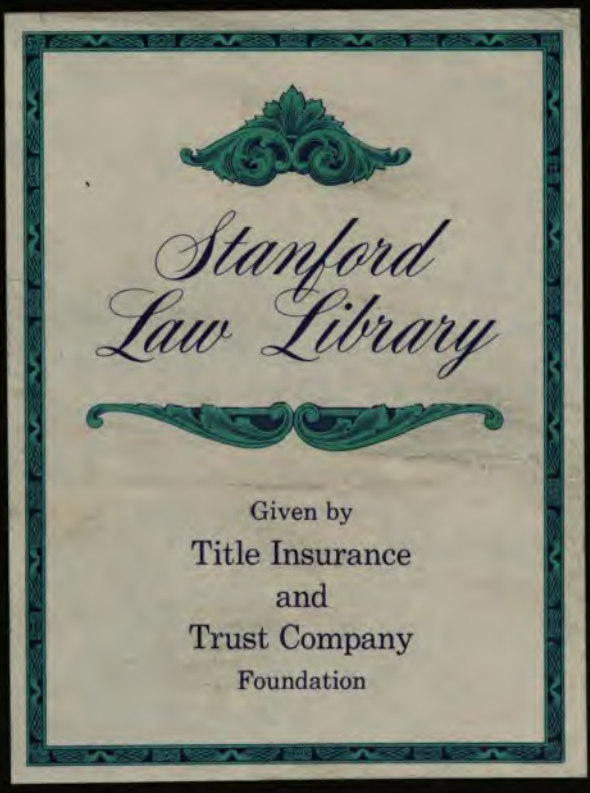
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AN OUTLINE

OF

THE LAW OF PROPERTY

BY

THOMAS RALEIGH, M.A.

FELLOW OF ALL SOULS COLLEGE

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PREFACE.

THE following pages have been written with an exclusive regard to the needs of those who are beginning the study of English law. I have endeavoured to give, in language as simple as may be, an outline of the Law of Property as it now stands, introducing only so much history as is absolutely necessary for the explanation of existing rules. My work is not meant to take the place of any existing text-book, but rather to supply those initial explanations, for want of which even the elementary books may prove unintelligible to a beginner. References to statutes and cases have been simplified and reduced in number, that the student may be able to refer to all the authorities which I quote.

To compress any part of the English law into a small book is not an easy task. I shall be grateful to any who will call my attention to mistakes and omissions.

OXFORD, 1890.

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ADDENDA.

P. 6. An easement is not, properly speaking, a hereditament. It is a right appurtenant to the ownership or occupation of a hereditament.

P. 10. The term *rent-service* includes rent paid under a contract of tenancy.

P. 29. The Lunacy Acts Amendment Act of 1889 enacts that when a person is lawfully detained as a lunatic, or proved to be incapable of managing his affairs, a judge in lunacy may appoint a person to act for him. Where the property is of small amount, orders may be made by a county court judge.

P. 71. A man could not convey land to himself at common law; but he could in effect do so by conveying to one who would reconvey to him. Thus if *A* wished to enfeoff himself and *B* in his land to certain uses, he might make a feoffment to *C*, and *C* could then make a feoffment to *A* and *B*.

THE

LAW OF PROPERTY.

CHAPTER I.

PROPERTY.

WHEN a person has the right to possess a thing and the right to use and dispose of it in an indefinite variety of ways, we say that he is the owner of the thing, or that the thing is his property. Full ownership (*dominium*) is a complex whole, made up of many rights: right to possess; right to use and destroy; right to sell and give away; right to lend and let for hire, etc.

The rights which make up full ownership may be broken up into separate rights and groups of rights vested in separate persons. A person may part with certain rights over his property without ceasing to be owner, as, for example, an owner of land who lets it to a farmer. Or he may cease to be owner and yet retain some right in or over the property, as, for example, an owner who sells his land, retaining the right to hold possession until the purchase money is paid, or the right to treat the land as a security for the purchase money.

Again, rights of ownership may be burdened; the person who has them may be restricted in exercising them. Suppose that an owner of land allows a neighbouring owner to acquire a right of way across it. In this case a fragment of the owner's right of use is broken off and vested in another. The owner's right of possession is not broken up; but it is burdened; he cannot exercise it so as to obstruct the right of way.

§ 1. *Possession.*

When we say that a person is in possession of a thing, we assert:—1. That he has the custody of the thing, or control over it, or at least that he stands in such a relation to it as will enable him to use it, or to receive the income derived from it; 2. That he manifests the will to maintain his relation to the thing, and to exclude other persons from acquiring control over it.

Possession may be called the outward form of ownership; but the form may be present without the reality. A person may enter into possession of a thing which is not his own. On the other hand, he may own a thing without having possession of it. In this latter case, if the owner has a right to immediate possession, he may, as a general rule, resume his property, if he can do so peaceably; but if he is prevented from entering on his land or from recovering his goods, he must assert his right by bringing an action. Hence arises the technical distinction between things in possession and things in action—that is things which must be recovered by action, if wrongfully withheld. Rights of entry and of action form one branch of the law relating to land. But the term chose (thing) in action is most commonly used to denote a claim to money or personal property. Thus if *A* owes me £100, the debt is a chose in action, forming part of my

personal estate. If *A* pays me the money, my property is reduced into possession; it is no longer a chose in action as between myself and *A*.

The following case illustrates what is meant by possession. Willoughby agreed to supply machinery for a barge belonging to Westlake. The barge was placed in dock to be fitted, and was entered in the dock books in the name of Willoughby. Westlake became insolvent, and his creditors claimed the barge. Two questions arose. 1. Was Willoughby in possession? He had acquired control over the barge by entering it in his own name; he had power and will to prevent others from acquiring control; therefore he was in possession. 2. Assuming Willoughby to be in possession, had he a lien—that is, a right to retain possession until his charges were paid? This point also was decided in his favour. Re *Westlake*, L. R. 16 Ch. D. 604.

§ 2. *Seisin.*

The term seisin was once nearly equivalent to possession, but in course of time it came to denote the status of a person holding land or real property by a free tenure. The term is not now equivalent to possession of land. A farmer, holding under a lease, has possession; but he has not seisin. It is the freehold owner, not the tenant for years, who is tenant in the feudal sense of the word. The freeholder owes suit and service to the lord of whom he holds, and is entitled to his protection.

The seisin of land may be left vacant, as e. g. when the freehold owner dies without making a will, and the heir delays to enter. In this case the heir has seisin in law, even before he enters. But if another enters before him, and so acquires a wrongful seisin in deed, the heir's seisin in law is gone. He is no longer seised in any sense, until he turns out the wrongdoer,

The following case shows how important it is to be accurate in using technical words, such as 'seised' and 'seisin.' R. Roberts,

a freehold owner of land, died intestate, leaving a daughter Anne, his sole heiress. Mary his widow entered on the land, under colour of a pretended will, and retained possession till her death in 1869: by her will she devised the property to Jay. Anne Roberts died in 1871, having devised 'all real estate of which I may die seised' to Leach. The question was, whether Leach could recover the property from Jay. Held that he could not, because Anne was not seised at the time of her death. *Leach* v. *Jay*, L. R. 9 Ch. D. 42.

§ 3. *Subjects of Proprietary Rights.*

The material things in which rights of property subsist are either movable or immovable: we may group them under the two general names of land and goods.

'Land' includes the soil of the earth, the minerals under it, and the air and water resting upon it. Things permanently attached to land become part of it, such as houses, fences, and fixtures generally; and things growing on land are regarded as part of it, until they are severed from it; but to this rule there are important exceptions.

The term 'land' has been especially defined by various Acts of Parliament: see, for example, the Conveyancing Act 1881, s. 2. But these definitions are made to serve the purposes of the Acts in which they occur; they do not help us to obtain any clear general notions about property in land.

Under the name of 'goods' we include all tangible and movable things which are the subjects of property. The term includes the produce of land, when severed from the soil in which it grows. But annual crops, such as corn, are regarded, even while growing, as the goods of the cultivator. This is an exception to the rule of law stated above, and the exception is made for the encouragement of industry.

The term 'chattels' is equivalent to 'goods.' Both terms are used in the sense explained in the foregoing paragraph,

and also in a wider sense, as we shall soon have occasion to see.

Coins and bank-notes fall within the definition of goods. But in considering money as property, two points must be kept clearly in view.

First, money is a fungible thing: that is to say, any current coin or note is adequately represented, for most purposes, by another or others of the same value. If you lend a man £10, you do not expect him to restore the coins lent; any coins or notes of the same value will do.

In the second place, money is a measure of value, and almost any right may be valued in money, so that we constantly speak of sums of money when we mean only rights having a certain value. Thus, when we say that a man is worth a million, we mean that all his rights, proprietary and contractual, may be valued at that sum.

§ 4. *Corporeal and Incorporeal Property.*

Only material things are properly described as corporeal; all rights over things, even the rights of one who owns land or goods, are incorporeal. It would perhaps be more logical to use the word 'thing' only of material corporeal things. But in the books about property, much is said of incorporeal things. These things, properly or improperly so called, are constituted as follows:—

There are certain rights and groups of rights over things which are definitely separate from other groups of the same kind. Thus, a farmer holding under a lease does not own the land, the corporeal thing over which he has rights. But his interest in the land is definite; it may be separately valued and dealt with: we regard it therefore as a separate subject of property, just as if it were a parcel of goods.

Even rights which are not rights over things may be

separately dealt with in the same way. A patent, for example, confers on the author of an invention the right to prevent others from using his invention without his consent. This right has a money value; it may be separately dealt with; we regard it therefore as a subject of property, a separate incorporeal thing.

It is not necessary, at this stage of our inquiry, to attempt an exhaustive classification of proprietary rights not amounting to full ownership of a tangible thing. A few examples may serve to illustrate their nature.

A person may have rights in land which belongs to another. He may have a right to take part of the produce of the land—e. g. to dig for clay, or to receive a fixed sum out of the rent—and this kind of right is called a profit. He may have a right to use his neighbour's land for his convenience—as e. g. by using a road which crosses it—and this kind of right is called a positive easement. Again, he may have a right to prevent his neighbour from making an inconvenient use of the land—e. g. a right to forbid the erection of buildings which obstruct the light—and this kind of right is called a negative easement.

Profits and easements are regarded in law as partaking of the nature of property in land. They are called Incorporeal Hereditaments, because, like other property in land, they descend to the heir.

Again, a person may have possession of the land of another for some limited time or purpose. A tenant has possession of his landlord's property for the term of his lease; a creditor may obtain possession of his debtor's land and hold it until his claim is satisfied. These limited interests were not formerly regarded as property in land, but rather as personal rights against the owner of the land. Being thus on the same footing as things movable and personal, they are called Chattel Interests in Land. They are not hereditaments.

In the same way, a person may acquire rights in or over movable things which belong to another. In the case of Westlake, cited above, Willoughby did not become the owner of the barge, the corporeal thing in question; but he acquired a lien upon it—a right which clearly had a money value, for it enabled him to obtain payment of his account.

§ 5. *Real and Personal Property.*

In former times, actions at law were real, personal, or mixed. Real actions were brought for the recovery of land; personal actions for the recovery of goods, or to obtain damages for breach of contract or other injury. Mixed actions were brought for the recovery of land and for damages in respect of injury sustained. Most of the real and mixed actions have been abolished, and the procedure in those which remain has been assimilated to the procedure in personal actions. But we must still take note of the old classification of actions, because it is the basis of the distinction between real and personal property.

'Real property' includes all property which might formerly have been recovered by a real action: i. e. all interests in land, except those which we have already described as chattel interests. It includes all those interests in the land of another called incorporeal hereditaments. Real property is subject to land tax and local rates, but not to probate duty. If not disposed of by will, it descends to the owner's heir, not to his personal representatives.

'Personal property' includes money, goods, choses in action, chattel interests in land, and all valuable rights not falling within the definition of real property. A will of personal property must be admitted to probate; and probate duty must be paid on the total amount of the property disposed of. If not disposed of by will, personal property goes to the personal representative, not to the heir.

We sometimes use the term 'goods' or 'goods and chattels' to include the whole of a man's personal property. This is, of course, a much wider sense of these terms than the sense previously explained.

The distinction between real and personal property rests, as we have seen, on obsolete forms of procedure. It does not correspond to the distinction between movable and immovable things; it is, in fact, not a logical distinction at all, and of this several proofs may be given.

First, property may be real for one purpose and personal for another. If partners in business acquire houses and land, they pay rates and taxes as owners of real property; but the interest of each partner in the land is part of his personal estate.

Again, of two pieces of property essentially alike, one may be real, the other personal. A share in the New River Company is real property, because the original charter of the Company provided that the shares should be held as freehold lands are held. A share in the Chelsea Waterworks Company is personal property, because the Acts under which the Company is constituted so provide.

In some cases, the mere will of the owner decides whether property is to be real or personal. If an owner of land, in making his will, directs that the land is to be sold, and the proceeds applied in paying legacies etc., the land is taken to be converted into personalty from the moment of his death. If, on the other hand, he directs that money is to be laid out in the purchase of land, the money is in like manner taken to be converted into real estate.

This 'equitable doctrine of conversion' was discussed in the leading case of *Ackroyd* v. *Smithson*, 1 Bro. C. C. 503; W. and T. vol. I. The facts of that case were as follows. Dr. Holdsworth by his will gave his real estate to Smithson and another in trust to sell, and out of the proceeds to pay certain legacies. Two of the

legatees died before the testator; their legacies therefore lapsed. The next of kin claimed the two legacies, as being personal property not disposed of by will. But Mr. Scott (afterwards Lord Eldon), being counsel for the heir, argued that the testator intended his land to be converted into money for the benefit of certain persons; that the intention failed in part, owing to the death of two of these persons; that the land (so far as these two shares were concerned) was therefore unconverted and should descend, as real estate not disposed of, to the heir. This argument was successful, and Lord Thurlow gave judgment for the heir.

Another case turning on the difference between real and personal property is *Bligh* v. *Brent*, 2 Y. and C. 268. Brent was possessed of shares in the Chelsea Waterworks Company. By his will (made in or before 1836) he gave all his property to his wife. The will was not made with the forms then required to pass real property. Brent's heir claimed the shares, as being real property not disposed of. But the Court held that the Company was formed by Act of Parliament to manage certain moneys subscribed by the shareholders, and to make a profit on those moneys by supplying water. The acquisition of land was only an incidental necessity; the shares were not shares in land, but shares in capital, and therefore personal estate.

§ 6. *Property and Income.*

In considering any piece of property, we have to distinguish between the corpus or total value of the thing, and the income to be obtained by using it, or by letting it out to another.

The corpus or permanent value of land is called 'the inheritance.' Ownership of the inheritance carries with it the right to part with the land, as e.g. by selling it, and the right to impair its value by committing what are called acts of waste. Such acts are either *voluntary*, as when minerals are dug out and carried away; or *permissive*, as when buildings are suffered to fall into decay for want of repairs.

Any yearly or periodical profit issuing out of land is called

a rent. Several kinds of rent are mentioned in the books; for the present it may suffice to specify three. *Rent-service* is paid by the owner of land to the feudal superior of whom he holds it. *Rent-charge* is paid by the owner of land to the person in whose favour the charge has been created. *Rent*, when it stands alone, usually denotes a rent paid to the owner of land by the occupier, in terms of a contract of tenancy.

The term 'capital' is used to denote the total value of a stock of goods or of a sum of money. When personal property is regarded as capital, means are taken to preserve it from being wasted, and to deal with it so that it may produce an income. This income is received in the form of interest, or in the form of profit.

Interest is an annual or periodical payment for the use of money belonging to another. The rate or percentage to be paid is sometimes fixed by agreement; and there is now no law to prevent a creditor from agreeing with his debtor for any rate of interest, however exorbitant. In some cases the interest to be paid on a debt is assessed by a jury; and the judge usually advises the jury to assess it at 5 per cent., that being taken to be 'the ordinary commercial value of money.' In other cases again, the rate is fixed by statute; for example, the 1 and 2 Vict. c. 110 enacts that a debtor against whom his creditor obtains judgment shall pay interest at 4 per cent. from the time of entering up the judgment. When interest is ordered to be paid by a court of equity the 'ordinary court rate' is 4 per cent.

Profit may be defined as the precarious income derived from commerce. Every trader, if he be a man of business, keeps a separate capital account, so that he may ascertain from time to time whether the stock of goods and money with which he trades is increasing or diminishing. Setting aside what belongs to capital account, the excess of his receipts over his current expenditure represents the profit of his business.

Trade losses are sometimes paid out of capital; but a prudent trader will prefer to pay the losses of a bad year out of the profits of a good one, and the propriety of this practice is recognised by the courts.

When property is so dealt with that the income is enjoyed by one person while the inheritance corpus or capital is preserved for another, the property is said to be settled.

Difficulties may arise in distinguishing between the capital and the income of settled property: see In re *Barton's Trust*, L. R. 5 Eq. 238. Barton gave five shares in a Company to trustees, upon trust to pay the dividends and profits to Mrs. Latcham, and after her death upon trust for her children. The Company resolved to increase their capital, and the trustees received three new shares instead of accumulated profits to which they were entitled. On Mrs. Latcham's death, her husband claimed the new shares, on the ground that they were profits which the trustees were bound to pay to him as representing his wife, the tenant for life. Page Wood, V. C., held that the profits in question had been turned into capital; and the new shares went to Mrs. Latcham's children. A similar question was argued and decided in *Sproule* v. *Bouch*, L. R. 29 Ch. D. 635.

Property is not the only source from which income is derived. Wages, salaries, and pensions are included under the general name of income.

All rents, annuities (including salaries and pensions), dividends, etc., are (like interest) regarded as accruing from day to day, and are apportioned on this principle between successive owners of the same property. If, for example, an owner of land dies on the 1st August and his heir succeeds to the land, the Michaelmas rents will be paid to the heir; but the part of the rent which accrued up to the 1st August may be recovered from the heir by the personal representatives of the deceased. See the Apportionment Act, 33 and 34 Vict. c. 35.

CHAPTER II.

LEGAL AND EQUITABLE OWNERSHIP.

RIGHTS of property, like other rights, are said to be enforced when parties are compelled to respect them or punished for infringing them. Courts of justice are invested with powers of compulsion and punishment; and they exercise their powers with regard to the facts put in evidence before them.

§ 1. *Title.*

The evidence by which a person proves himself to be the owner of a thing is called his title. My title to the books now on my table consists in possession; the fact that they lie there is evidence that they belong to me, and the title is good enough, unless some person can produce better evidence to the contrary. If I own a sum of Consols, my title consists in the entry of my name in a book at the Bank of England.

Title to land may be possessory; for if I occupy land as owner, or receive rent from the occupier, there is evidence that the land belongs to me. If I remain in peaceable possession for twelve years, the law, as amended by the Real Property Limitation Act, 1874, will regard my long possession as a good answer to any rival claim.

Property passes from one person to another, sometimes by an act of the parties, as e.g. by deed or will; sometimes by

an act of the law, as when an owner of land dies intestate, and the law gives the estate to his eldest son. Title to property may therefore consist in a series of deeds, wills, certificates of birth and death, and other documentary evidence showing how the present owner came by his rights.

The legal owner of a thing is the person who can make out his title to it in a court of law.

§ 2. *Uses and Trusts.*

The legal ownership of a thing may be vested in one person, in the trust or confidence that he will hold or apply it for the benefit of another. When this is done the thing may be said to have two owners. The legal owner can show a title to the thing; but equity will not permit him to exercise his rights for his own benefit. The beneficial or equitable owner cannot prove either *jus in re* or *jus ad rem*; but he can bring the legal owner into a court of equity, and compel him to fulfil the duty imposed on him.

The Judicature Acts have done away with the system under which courts of law and courts of equity administered different and sometimes conflicting rules. The rules of law, as developed by the Courts of common law, and the rules of equity, as developed by the Court of Chancery, are now administered concurrently; where they conflict, the rules of equity prevail. But this process of fusion has not abolished, and was not intended to abolish, the distinction between legal and equitable ownership.

At a very early period, owners of property began to take advantage of this distinction for their own convenience. For example: the old common law would not permit freehold land to be conveyed unless by livery of seisin—that is by formal delivery of possession. But if *A* wished to convey to *B* without livery, he might enfeoff *C* and *D* in his land

(i.e. convey and make livery to them) to the use of *B*. *C* and *D* would then hold as feoffees to the use of *B*, who was called *cestui que use* (he that has the use). This is a case of what we should now call a *simple trust*, *C* and *D* being regarded only as the means of conveying the estate to the beneficial owner, *B*.

Or again, *A* might convey his land unto and to the use of *C* and *D*, in trust to receive the profits and pay them over to *B* during his life. In this case the use was in *C* and *D*; but the *special trust* by which they were bound would be enforced against them, in a court of equity, at the suit of *B*. They were, in short, trustees; and *B* was *cestui que trust* (he that has the benefit of the trust).

The system of uses and trusts of land was regarded with disfavour by the common lawyers and by Parliament. They thought this kind of dual ownership tended to impair the security of legal titles and to subvert the common law. After making several partial attempts to deal with the question, Parliament passed an Act which went, or seemed to go, to the root of the matter; and this Act is still in force.

§ 3. *The Statute of Uses.*

The Statute of Uses, 27 Hen. VIII. c. 10, enacts that when any person stands seised of any hereditament to the use confidence or trust of any other person, such person as hath any such use confidence or trust shall be deemed in lawful seisin of the hereditament.

The effect of these words is to annex the 'lawful seisin'—the legal ownership—to the equitable ownership of *cestui que use*.

One object of those who framed the statute was to maintain the rule of common law as to the necessity of livery of seisin in conveying a freehold. But so far from strength-

ening the old rule, the statute actually opened up new ways of conveying without livery. For example, if *A* bargained and sold his land to *B*, the effect of the bargain and sale, in equity, was that *A* stood seised of his land to the use of *B*. The statute thereupon gave the 'lawful seisin' to *B* without formal delivery. Parliament at once took note of this mode of conveying freeholds; and the Statute of Inrolments, 27 Hen. VIII. c. 16, enacted that no freehold should pass by reason only of a bargain and sale, unless the bargain and sale were made by writing, indented sealed and inrolled in the manner prescribed by the Act.

Another object was to strike a blow at uses and trusts. But here again the provisions of the statute failed to carry out what seems to have been the intention of its authors. Consider carefully the words quoted above from the Statute of Uses, and note the following points:—

Trusts of personal property are not affected. The statute speaks only of hereditaments.

Special trusts of land are not affected. In the case of special trust given above, *C* and *D* hold to their own use, in trust to receive the profits and pay them to *B*. The statute is not needed to give *C* and *D* the lawful seisin; they have it already.

Even simple uses of land are not always within the statute. If *A* stands seised to the use of *B* to the use of *C*, *B* is entitled to take the seisin, for *A* stands seised to his use. But *C* is not so entitled: neither *B* nor anybody else stands seised to *his* use; his rights are merely equitable, and must be enforced as a simple use would have been enforced before the statute.

About fifteen years after the passing of the Statute of Uses, Jane Tyrrel, widow, bargained and sold her lands to George Tyrrel, to the use of the said Jane for life, and after her death to the use of the said G. T. &c. The effect of the bargain and sale was (as we

have already seen) that Jane stood seised to the use of G. T. the bargainee. The judges held that the statute gave the lawful seisin to G. T., and that the subsequent uses were void at law. This case is commonly quoted as an authority for the rule that (at law) there can be no 'use upon a use.' *Tyrrel's Case*, Dyer, 155[a].

Although the Statute of Uses did not effect all that its preamble seemed to promise, it must be regarded as occupying a very important place in the history of our land laws. By annexing the legal estate to the use, Parliament made the legal estate as transferable—as easily disposed of, in the way of contract or of family settlement—as the use had previously been. Conveyancers inserted uses in order that the statute might operate upon them and turn them into legal estates.

When, therefore, we meet with a case in which uses have been created, we must always ask: Are these uses 'executed' and turned into legal estates by the statute; or are they uses, like those in Tyrrel's case, which retain a merely equitable character?

§ 4. *Creation of a Trust.*

An *express* trust is created when the owner of property makes use of language which evinces or clearly implies an intention (1) to hand the property over to another, that he may hold it in trust for some specified purpose or purposes, *or* (2) to hold the property himself as trustee for another.

A *constructive* trust arises where, although no express declaration of trust has been made, a court of equity sees reason to infer that a person holding property holds it as trustee for another, and not for his own benefit.

All trusts of lands or hereditaments must be proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will, or else they shall

be utterly void. But where a trust arises by implication or construction of law, this rule does not apply. Stat. Frauds, 29 Car. II. c. 3. ss. 7, 8.

These sections of the Statute of Frauds seem at first sight to make writing necessary in order to the creation of a trust of lands. But the exception almost nullifies the rule laid down: and trusts of lands are created every day without writing. Suppose, for instance, that an owner of land deposits his title deeds with a banker as security for a loan. Even if there is no written memorandum of the transaction, the owner holds his land as trustee, *pro tanto*, for the banker; and a court of equity may compel him to execute a legal mortgage of his estate, by way of security for the advance.

The court will not in any case allow the Statute of Frauds to operate where it would effect injustice or fraud.

Haigh conveyed a freehold estate to Kaye, 'in consideration of the sum of £850.' The transaction was a mere pretence; Kaye did not pay the sum mentioned; and Haigh meant Kaye to hold the land as trustee for himself. Kaye held it for his own benefit, and claimed the protection of the Statute of Frauds. The Court thought Kaye was plainly a trustee, and directed him to re-convey the estate. *Haigh* v. *Kaye*, L. R. 7 Ch. 469.

§ 5. *The Trustee.*

A person becomes a trustee by accepting the trust reposed in him. He is taken to accept if he makes an express declaration to that effect, or if he acts in the matter of the trust, or if he fails to disclaim within a reasonable time. Disclaimer is usually made by deed; but an informal disclaimer is sufficient, if the intention is plain.

The interest which the trustee takes in the trust property is to be gathered from the terms of his appointment, or from the circumstances under which the trust arises. But it is a general rule that trusts are to be construed, if possible,

so as to give the trustee a legal interest sufficient for the execution of the trust. Thus, for example, if freehold lands be granted to *C* and *D* 'in trust to receive the rents and profits and pay them over to *B*,' these words would be sufficient to vest the legal ownership in *C* and *D*. They must be legal owners in order to perform the special trust imposed on them. If the lands are granted to them 'in trust to permit *B* to receive the rents and profits,' the purpose of the grant will be answered by treating it as a case of simple trust, and by allowing the 'lawful seisin' to vest in *B*, in accordance with the Statute of Uses.

If there be two or more trustees, they take as joint owners; there is 'benefit of survivorship' between them, so that if one dies the trust property passes to the survivor or survivors. In the case of a trust created in or since 1882, any power or trust given to or vested in two or more trustees jointly may be exercised or performed by the survivor or survivors, unless the contrary is expressed in the settlement. Conveyancing Act, 1881, s. 38. On the death of a sole or last surviving trustee, the trust property devolves on his personal representatives. Real estate vested on any trust in any person solely, shall on his death devolve to and become vested in his personal representatives, notwithstanding any testamentary disposition to the contrary. Ibid. s. 30.

Where a trustee is dead, or remains out of the United Kingdom, or desires to be discharged, or refuses or is unfit to act, or incapable of acting, the Conveyancing Act makes provision for the appointment of another person or other persons, and for the vesting of the property in the new trustee. See ss. 31–34. Where these sections do not apply, parties may have recourse to the High Court, and a judge of the Chancery Division may make an order appointing new trustees and vesting the trust property in them.

The duties and powers of trustees vary according to the

terms of their appointment and the circumstances of the case. A trustee must in all cases follow the lawful directions of the person creating the trust. He must look to the defence and management of the property confided to him, using the same diligence and care as a prudent man would use in the conduct of his own affairs. He may not depute his duties to a stranger, or even to a co-trustee, unless he is authorised to do so by the terms of his trust or by the ordinary usage of business. He must deal fairly with his *cestui que trust*, and render him proper accounts. He is entitled to charge the trust estate with expenses properly incurred, but he receives no remuneration, unless by virtue of an express authority or stipulation to that effect; and he is strictly forbidden to make any profit for himself out of his fiduciary position. If he encounters any difficult questions in administering his trust, he may protect himself by applying to a judge of the Chancery Division for directions. If there is a reasonable doubt as to the rights of persons claiming the benefit of the trust, the trustee may protect himself by paying trust moneys to the Paymaster General, to attend the orders of the Court. One or two cases may be given to illustrate the spirit in which courts of equity deal with trustees.

A person possessed of a lease of the profits of a market bequeathed the lease to a trustee, in trust for an infant. Before the expiration of the term, the trustee applied for a renewal of the lease in the name of the infant. This was refused: the trustee then got a lease made to himself. At the suit of the infant, the trustee was ordered to assign the lease to him, and to give an account of the profits. This case is commonly cited as an authority for the rule that no person in a fiduciary position is permitted to make a profit out of his trust. *Keech* v. *Sandford*, 1 W. & T., p. 53.

Speight, by his will, gave his real and personal estate to Gaunt and another, on certain trusts for the benefit of his family. Gaunt employed Cooke, a broker then in good credit, to invest moneys

belonging to the trust. Cooke, by false representations, obtained the moneys from Gaunt, appropriated them to his own use, and afterwards became insolvent. The Speight family brought an action to compel Gaunt to make good the loss thus occasioned. It was held by the Court of Appeal that Gaunt was justified by the usage of business in employing a broker; that the payment to Cooke was regularly made; and that Gaunt was not guilty of negligence and therefore not liable to make good the loss. *Speight* v. *Gaunt*, L. R. 22 Ch. D. 727. This decision was upheld by the House of Lords. See 53 L. J. Chancery, 419.

§ 6. *Cestui que Trust.*

In the case of a simple trust, the trustee, as we have seen, is simply the means by which the trust property is conveyed to the beneficial owner. If a simple trust is within the Statute of Uses, the law transfers the property at once to *cestui que use*. If the case is one to which the Statute does not apply, the legal ownership will vest in the trustee, but he must, on demand, execute any forms which may be necessary to convey it to the *cestui que trust*.

In the case of a special trust, the trustee retains the legal ownership, in order that he may perform the duties imposed on him; *cestui que trust* has only an equitable estate or interest in the property.

'Equity follows the law:' the meaning of this maxim is that the rights and duties which attach to an equitable estate or interest are modelled on those which attach to a legal estate or interest. For example, if a man dies intestate, the law gives his land to his heir-at-law, and his personal property to be distributed among his family or next of kin. In like manner, equity gives his equitable estates in land to the heir, and his equitable interests in personalty to be distributed among the next of kin.

If equity follows the law, it is also true to say that law follows equity. From an early period, Parliament and the

courts of law were compelled to take notice of an equitable owner, and to treat him for some purposes just as if he were a legal owner. For example, property in land carries with it the duty of serving on juries, and the right of voting in parliamentary elections; and for these purposes an equitable owner in possession is on the same footing with other land-owners.

CHAPTER III.

OWNERS IN SEVERALTY.

RIGHTS of property are said to be *vested* when there is an actual person in whom they reside. If, for example, land is given to *A*, an unmarried man, for his life, with remainder to his eldest son, *A's* estate is vested in him; the remainder is *contingent* on his having a son. As soon as a son is born to him, the remainder vests in that son 'in right or interest.' It will not be vested in possession until the termination of *A's* life estate.

Observe that an interest may be vested, even when it is by no means certain to take effect. Thus, if land be given to *A*, an existing person, for his life, with remainder to *B*, also an existing person, for *his* life, the remainder is not contingent; it is vested in *B*. But it may never take effect,—for *B* may die before *A*.

When property is vested in a single individual, whose title and interest are distinct from those of other persons, the individual in question is said to be an owner in severalty.

The person in whom property is vested may be a person of full age, capable of exercising all his rights. He may, on the other hand, be a person under disability: in this case he is restricted in the exercise of his rights by his want of legal capacity.

Disabilities arise, according to the rules of private law, from the fact of marriage in the case of women, from want of discretion in the case of infants and lunatics. Disabilities

are imposed, by way of penalty, on bankrupts and convicts; and on aliens for reasons of public policy.

§ 1. *Married Women.*

A married man is not, as such, subject to any disability. He may use his property as he thinks fit. He may, by using the proper legal forms, dispose of his property, *inter vivos* or by will, without regard to the claims of his wife. The Dower Act, 1833, provides him with various simple methods of barring his wife's claim to dower.

A married woman must still be regarded, for certain purposes, as a person under disability. The old common law placed the wife and her property under the control of the husband. Her money and goods became his; the profits of her land were received by him during the marriage. On the birth of issue, he became tenant 'by the curtesy of England' of his wife's land, and held it for his own life if he survived her. The wife, having parted with the control of her person and property, became incapable of contracting, unless as agent for her husband, or for some other person having legal capacity.

These ancient rules were greatly modified by the recognition, in equity, of 'that blessed word and thing, separate use.' When property was given for the separate use of a married woman, equity would not permit the husband to deal with it as his own: if it came into his hands at all, he held it as trustee for his wife. Over her separate estate a wife had, and still has, almost all the power of an owner in severalty. She can dispose of it, *inter vivos* or by will, or enter into contracts concerning it.

If a person gives property to another, he cannot as a general rule prevent the donee from alienating the property conferred on him. But to this rule an exception is admitted in the case of married women. Property may be given to

a married woman with a 'restraint on anticipation,' and such a restraint is effectual to protect the property against any debt contracted or disposition made by the donee during the marriage.

Such are the principles which the courts have applied to the property of married women. It remains to show how these principles have been extended and modified by legislation.

The Married Women's Property Act, 1870, extended the doctrine of 'separate use' to all the wages and earnings of a married woman: to stocks, shares, etc. standing in her name: and (in the case of a woman married after 9 Aug. 1870) to personal property not exceeding £200 coming to her during the marriage, and to the profits of land descending on her. A husband married after the Act was freed from liability for the ante-nuptial debts of his wife. But by an amending Act of 1874, the husband, if married after 1874, was made liable to the extent of any assets coming to him in right of his wife, and of assets fraudulently transferred by her with his consent.

The Conveyancing Act, 1881, s. 39, provides that when a married woman is restrained from anticipation, the court may, notwithstanding such restraint, bind her interest in the property by judgment or order, with her consent.

Finally, the Married Women's Property Act, 1882, repealing the Acts of 1870 and 1874, enacts in general terms that a married woman shall be capable of acquiring, holding, and disposing of property as her separate property, as if she were a *feme sole*, without the intervention of a trustee. A woman married on or since 1 Jan. 1883, holds as her separate property all property belonging to her at the time of marriage or acquired during the marriage. A woman married before 1883 holds as her separate property all property to which her title accrued on or since 1 Jan. in that year. The husband is made liable for his wife's ante-nuptial

debts, to the extent of the property which he acquires from or through her.

I have mentioned these Acts in their chronological order, because it is important, for practical purposes, to keep that order in mind. To know what are the rights of a married woman and her husband, you must know the date of the marriage. A woman married before 1834 is not within the Dower Act. A woman married before 1883 is only partially affected by the Act of 1882. If, for example, she wishes to convey land which belonged to her before 1883, she can only do so with her husband's concurrence, by a deed duly acknowledged with the forms prescribed by the 3 & 4 Will. IV. c. 74.

The M. W. P. Act removes many restrictions formerly imposed on married women; but it does not go so far as to make a married woman a separate person. If judgment be recovered against her, execution may issue against her property but not against her person, which is under the control and protection of her husband.

Formerly, if property were given to husband and wife they were said to take 'by entireties' as one person. If property were given to husband and wife and a third person, the gift was usually so construed as to give half the property to them, and the other half to the third person. And inasmuch as the Act of 1882 does not purport to alter any rights, except those of husband and wife, *inter se*, it appears that this rule of construction is still in force.

Stephen Jupp, by his will, dated in 1887, gave a share of his property to be divided 'between my sister Mary Buckwell, Daniel Buckwell her husband, and Harriet Buckwell her stepdaughter, in equal parts.' The executor took out a summons against the legatees to have it determined how the legacy should be divided. Kay J. held that Harriet took one half, the other half being taken by the husband and wife. Daniel took one fourth, and Mary one fourth as her separate property. In re *Jupp*, L. R. 39 Ch. D. 148.

§ 2. *Infants.*

An infant may acquire and enjoy the use of property, without the intervention of any trustee. He may also take the benefit of contracts made with him. But he may repudiate liability in respect of his contracts and acts during infancy; they are, with few exceptions, voidable at his option. Some acts are so manifestly to his prejudice that they are rendered void by positive rules of law. It appears, then, that the acts of an infant owner are of three kinds:—

(1) Acts binding on the infant. Under this head are included contracts for necessaries, and acts done in obedience to an Act of Parliament, or by the direction of a court of competent jurisdiction. For example, the 18 & 19 Vict. c. 43 empowers a judge of the Chancery Division to sanction a settlement, or contract for a settlement, made by an infant on his or her marriage; and any such settlement or contract is binding on the infant.

(2) Acts voidable at the infant's option. Under this head are included most of the acts by which property is acquired or alienated.

Matters of record, such as judgments, recognisances, etc., must be set aside during infancy. But the general rule is, that an infant may choose, on attaining the age of twenty-one, whether he will confirm or rescind acts done during his infancy.

If on attaining full age he continues to hold property acquired during infancy, his action will amount to a confirmation of the act by which the property was acquired. In like manner, if he continues to take the benefit of a continuing contract (e. g. a contract of partnership) he will make himself liable under the contract (liable e. g. in respect of debts incurred by the partnership after he comes of age). So also, I apprehend, if an infant, on attaining full age,

makes no attempt to set aside a conveyance or other act of alienation *inter vivos* done during infancy, he may be taken to have confirmed the act of alienation.

The power to confirm or ratify acts done during infancy seems to be limited to acquisition of property, dispositions of property *inter vivos*, and contracts of a continuing nature. For the Infants' Relief Act, 1874, enacts that no action shall be brought on any promise made after full age to pay a debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy. The words of the Act are very sweeping; but they were, as it seems, intended to apply only to those contracts which formerly required *express* ratification to make them binding. Disposition of property and continuing contracts do not require *express* ratification; therefore they are not within the Act.

If an infant, on coming of age, wishes to rescind a voidable act of his infancy, he must do so within a reasonable time. If he has acquired property, he must disclaim it; if he has alienated property, he must take steps to have his alienation set aside; if he has entered into a continuing contract, he must withdraw from it and cease to take the benefit of it. As to his other contracts (not being contracts for necessaries) he need not take any steps to rescind them. They are not binding on him during infancy, and the Infants' Relief Act precludes him from ratifying them.

If an infant, on coming of age, chooses to take the benefit of property acquired, or of a continuing contract, he cannot rescind the obligations which attach to it. If, for example, he holds shares in a company, he must pay calls on them, or repudiate the shares. He must not use his privilege to rescind in a fraudulent manner. Thus, if a trustee pays trust funds to an infant of twenty, and the infant, on coming of age, brings an action to compel him to pay over again, the

action will probably fail. 'An infant has no privilege to cheat.'

(3) Acts wholly void. It is sometimes said that an act done by an infant which cannot be for his benefit is wholly void; but this statement seems to be incorrect. If, for example, a trustee pays part of a trust fund to an infant, and persuades him to give a release for the whole, it is plain that the release cannot be for the infant's benefit. But, so far from being wholly void, it is not even wholly voidable. It is treated, in equity, as a good release for the money actually paid, though it does not preclude the infant from suing for the balance. See *Overton* v. *Banister*, 3 Hare, 503.

If the foregoing paragraph is correct, the acts of an infant which are void are those which are made void by Statute.

The Wills Act, 1837, s. 7, enacts that no will made by any person under twenty-one years of age shall be valid.

The Infants' Relief Act, 1874, provides that all contracts entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void.

§ 3. *Lunatics.*

A person of weak or unsound mind may acquire and hold property, without the intervention of a trustee. If he is a lunatic (so found by inquisition), he is placed under the special protection of the judges having jurisdiction 'in lunacy': the jurisdiction is conferred on the Lord Chancellor and certain other judges by special delegation from the Crown. Money, stocks, etc. belonging to a 'Chancery lunatic' are usually transferred into court; land or other property which cannot be so transferred is placed under the management of a person called the 'committee of the estate.' The powers and duties

of the committee are defined by Statute; they are exercised and performed under the directions of the judges.

Apart from the special rules which apply to lunatics 'so found,' any question relating to the property of a lunatic must be dealt with on general principles. Lunacy does not render a person incapable of acquiring or disposing of property. But he may repudiate liability for any act procured from him by a person who knows and takes advantage of his condition. And in the case of voluntary dispositions of property (gifts and wills) no effect will be given to the act of a person who is not sane enough to know what he is doing. Acts relating to a lunatic's property may therefore be divided on the same principle as the acts of an infant:—

(1) Acts which are valid: acts done by committees and others, in the exercise of legal powers, or in compliance with the order of a court of competent jurisdiction; and transactions executed and completed in good faith, no unfair advantage being taken of the lunatic.

(2) Acts voidable at the option of the lunatic or his representatives: under this head are included all contracts, etc. to which the lunatic's consent is procured by undue influence.

(3) Acts wholly void. A voluntary gift, made without adequate understanding, is void. (But if such a gift were completed by transfer of the property; if it were accepted in good faith; and if it were impossible to restore the parties to their original positions—in such a case, *quaere* whether the gift could be treated as wholly void.)

A will is not upheld if the testator's unsoundness of mind deprived him of the knowledge necessary for disposing of his property, or if the will was procured by undue influence.

If a person goes through the form of marriage, not being sane enough to understand the nature of the contract, the marriage is a nullity.

§ 4. *Other Owners under Disability or Restraint.*

An owner in severalty is subject to special restrictions in the following cases:—

Bankruptcy. When a person is adjudicated a bankrupt, his property (with some few exceptions) passes to his trustee in bankruptcy, for the purpose of being distributed among his creditors. The trustee may disclaim property which is burdened by onerous covenants, etc., and the effect of such disclaimer is to put an end to the rights and liabilities of the bankrupt. The bankrupt is not rendered incapable of holding or acquiring; he may even, in some cases, make a valid transfer of property for value. But whatever he holds or acquires may be claimed on behalf of his creditors. These restrictions are in force until he obtains his discharge.

Conviction. Attainder is now abolished, and outlawry is practically obsolete. But a person sentenced to death or penal servitude, for treason or felony, is subject to the special disabilities imposed by the 33 & 34 Vict. c. 23. A convict is not rendered incapable of holding or acquiring property; but he is incapable of bringing any action for the recovery of any property, debt, or damage; of alienating or charging any property; and of making any contract. These disabilities continue until the convict dies, or is made bankrupt, or is pardoned, or undergoes the punishment to which he is sentenced. In the event of his dying or being pardoned, or on the completion of his sentence, the property reverts to the convict or his representatives. The Crown may appoint an administrator to manage a convict's property during the time of his disability. The powers and duties of an administrator are defined by the Act.

Alienage. Since 1870, an alien may acquire and hold property as freely as a British subject, *except* property in a British ship.

CHAPTER IV.

OWNERS IN COMBINATION.

Two or more persons cannot be in possession of the same property, if their interests are hostile or incompatible with one another. If, for example, two persons attempt to occupy the same land, each being *primâ facie* in possession, the law will, if possible, regard the one who has the better title as being in sole possession. If both titles are equally slight, we can only say that the possession of the land is in dispute.

Two or more persons having friendly interests may have 'unity of possession' in the same property. Such unity is found, for example, in cases of joint tenancy and tenancy in common. (Only an owner of real property is properly described as a tenant; but the term is extended by analogy to personal property.)

§ 1. *Joint Ownership.*

When property is given or conveyed to two or more persons, with words which indicate that they are to take as joint tenants, or without any words which indicate that they are to take distinct interests, the persons in question are joint owners. If the interests given are unequal, that is a sufficient indication that they are meant to be distinct. Joint owners always have equal interests.

If joint owners are in possession, each is in possession of the whole property; but neither has full possession, such as

a sole owner may have. Thus, for example, joint owners of freehold land are said to be seised *per mie et per tout* (for no part, and for the whole). Each joint owner may exercise rights of ownership over the whole property, but if one acts so as to deprive the others of their rights—if e. g. he totally destroys a part of the property—the others may maintain an action against him.

During the joint ownership, the rights of the owners are equal. They may exercise their rights jointly, acting as one owner: if e. g. joint owners of land make a lease, this is a partial alienation of the property in which they are all interested. They may also exercise their rights severally: if e. g. one joint owner of land makes a lease, this is a partial alienation of his own interest in the property.

Since each is owner of the whole, the death of one does not change the ownership. If one joint owner dies, his interest comes to an end; the property remains vested in the survivor or survivors. No person can claim it through the deceased. His heir, his executor, a person having a charge on his property—all these have claims on the things which are left without an owner at his death. But things of which he was joint owner are *not* left without an owner at his death.

R. Gilbert and Mrs. Neale were joint owners of a house. In Jan. 1754 Gilbert made his will and devised his interest in the house to his wife. In Oct. 1754 a partition was made, and Gilbert became sole owner of the house. He died in 1757, and Mrs. Neale was his heiress at law. As heiress she was held entitled to the house; because the devise to the wife was bad when made, and the subsequent partition did not make it good. *Swift* d. *Neale* v. *Roberts*, 3 Burrows, 1488.

Observe that, under the Wills Act, 1837, the subsequent partition would make good such a devise as Gilbert's; for a will now speaks from the testator's death; and at the time of his death Gilbert was sole owner.

Joint ownership may come to an end in various ways. By survivorship, when the last survivor becomes sole owner of the property. By partition, when the owners execute a deed for that purpose, or apply to the Chancery Division to make partition between them. By alienation, for, if one joint owner makes a transfer of his share *inter vivos*, this brings in a person who has not 'unity of title' with the remaining owner or owners, and consequently does not hold jointly with him or them. On the same principle, if *A* and *B* are joint tenants for life, and *A* acquires the reversion, the joint tenancy is at an end. *A* holds by virtue of a title different from *B's*; he is owner of the property, subject to *B's* life estate.

When two or more trustees are appointed, it is usual to make them joint legal owners of the trust property. The arrangement is convenient; for, if one trustee dies, the property remains in the survivors; no form of conveyance is necessary to vest it in them.

Except in the case of trustees, equity does not favour joint ownership: the rule as to 'benefit of survivorship' makes too much to depend on the mere chance of life. This equitable view of the matter finds expression in two practical rules.

The first of these applies to executory trusts. A trust is executory when something remains to be done before it is fully constituted: as, e. g., when articles are drawn up on which a formal settlement is meant to be founded; or when property is given by will to trustees, with directions to have it settled in a certain way. In construing such articles or directions, the Court will not allow a joint ownership to be created where the words used may reasonably be held to create a tenancy in common.

The second of the rules in question applies to agreements for severing joint ownership. A deed of partition is

prescribed by law as the proper instrument for effecting a severance by act of the parties. But even an informal agreement operates as a severance in equity.

§ 2. *Ownership in Common.*

When property is given to two or more persons 'as tenants in common,' or with words which indicate that they take distinct interests, the persons in question are owners in common. Their shares are not necessarily equal; nor is it necessary that their title should be the same.

During the tenancy in common, the position of the owners is analogous to that of joint tenants. Each may exercise rights over the property as a whole, but none may exercise his rights so as to deprive or totally exclude the others.

Murray and Hart were tenants in common of a coffee-room. Hart gave up the room to the landlord Hall. Hall and Hart forcibly expelled a person placed there by Murray, who brought an action of trespass against Hall. It was argued that Hall, standing in the place of Hart, was tenant in common with the plaintiff, and that the action therefore would not lie; but it was held that one tenant in common may maintain trespass against another. *Murray* v. *Hall*, 7 C. B. 441.

If one owner in common alienates his share, this does not put an end to the ownership in common. There is, indeed, no unity of title between the alienee and the other owners; but unity of title is not necessary to constitute ownership in common.

If an owner in common dies, the others do not take any benefit of survivorship. His share is his separate property; it goes to his own real or personal representatives. His heir, his executor, his widow, etc. have claims on it, as they have on the rest of his separate property.

Ownership in common comes to an end when the whole property becomes vested in one owner, or when it is divided

among several owners. Formal partition of property between tenants in common is made by deed, or by order of a Judge of the Chancery Division. But an agreement to make partition is treated in Equity as a severance of tenancy in common.

§ 3. *Coparcenary.*

When an owner of real property dies intestate, his heirs are sought among the persons related to him by blood. Among males in the same degree (sons for example) the eldest is sole heir, to the exclusion of the rest. Females in the same degree (daughters for example) are co-heiresses. They hold in coparcenary, and the coparcenary continues so long as the estate is held, undivided, by them or by their representatives in an uninterrupted course of descent. So long as they hold the property undivided, their position is analogous to that of joint tenants; but there is no benefit of survivorship between them. If a parcener dies, her share goes to her own representatives.

If a parcener alienates her share, the alienee does not become a parcener, but a tenant in common with the other parceners. If all, or all but one, should alienate to different persons, the coparcenary is obviously turned into a tenancy in common.

Coparcenary is also at an end if the whole property becomes vested in one owner, or if it is divided into two or more estates in severalty. Partition is made between parceners as between joint owners and owners in common.

In the case of gavelkind lands, there may be coparcenary between males in the same degree of relationship to the deceased owner.

§ 4. *Tenancy by Entireties.*

When property is vested in husband and wife as one person, they are said to hold as tenants by entireties.

If a woman, married before the M. W. P. Acts, had freehold lands not settled to her separate use, her husband acquired certain rights over them. The freehold was vested in husband and wife 'by entireties' during the marriage; the husband had the right to receive the profits; neither husband nor wife could alienate so as to prejudice the other.

Again, if, before 1883, a gift or conveyance of property was made to husband and wife, they took as one person. If a gift was made to husband and wife and a third person, the husband and wife took one half and the third person took the other half.

These rules have already been noticed in the last chapter. They are still of practical importance, in respect of property rights acquired by marriage both before and after the recent changes in the law.

§ 5. *Corporations Aggregate.*

It is part of the policy of the law that rights of property should be vested in definite persons. Suppose, for example, that a grant of land is made by the owner thereof to all the occupiers in a certain parish; this might be a good conveyance to the actual existing occupiers as joint tenants. But the grant would not confer any rights on occupiers generally, present and future. If such an indefinite body were allowed to take property, there would never be any person or body capable of dealing with the land in the ordinary way of business. Occupiers generally may indeed claim rights of a certain class, such as the right to use a path, or to dance on a village green. But when such claims are made by an indefinite body, the following points are to be noted:—

1. Only Easements can be claimed. Any right to take

value out of the land—e. g. the right to dig for clay—can only be claimed by definite persons.

2. The claim must be made by way of custom. If, e. g., the occupiers in a parish claim any right by prescription, i. e. if they say that their long user is evidence to show that the right was *granted* to them, the claim is bad; for no such grant would ever have been valid.

If property is to be applied for the benefit of an indefinite body, there are two ways in which this may be done. First, trustees may be appointed, with proper directions as to the management and application of the property. Or second, a charter or an Act of Parliament may be procured, to turn the indefinite body into the one definite 'artificial person' called a corporation. A corporation may hold and acquire property without the intervention of a trustee.

The essential attributes of a corporation are these. It has a name by which it acquires and conveys, contracts and is contracted with, sues and is sued. It has a constitution; that is, there are rules prescribing the relations of its members to the corporation—as, for instance, the rule, which prevails in most corporations, that the acts of a voting majority are binding on the whole body. It has perpetual succession; so long as new members can be brought in to replace those who die or retire, the corporation never dies, unless the law puts an end to its existence. It has a common seal, by which its acts are authenticated and formally signified.

A corporation cannot be formed without the authority of the State. If a town wishes to become a borough corporate, application is made to the Crown for a charter. If a railway or other commercial undertaking is projected, a Company may be incorporated under the provisions of general Acts of Parliament, or by a private Act, for the purpose of carrying it on. In the case of an ordinary trading company, the

'memorandum of association' must be registered, and the other forms prescribed by the Companies' Acts must be observed, in order to make it a corporation.

Some ancient bodies are corporations by prescription; they have enjoyed their rights so long that the law presumes they had a charter or Act of Parliament, which is now lost. Others, again, are corporations at common law; they have been corporations, by universal consent of the community, from the most remote period.

Each corporation exists for certain purposes; its powers and capacities are to be ascertained by reference to its origin and constitution, and to the scope of its proceedings. The limits imposed on a commercial corporation are, as a general rule, stricter than those imposed on an ancient corporation, such as an Oxford College. But no corporation can acquire and dispose of property as freely as an individual; each must act, and may be compelled to act, within the scope of the purposes for which it exists.

A railway company was incorporated by Act of Parliament, with power to take land by compulsory purchase, and to sell superfluous land. The company sold a piece of superfluous land, together with a right of way under one of their railway arches. The company having threatened to stop up the archway, Mulliner, who had purchased the land in question, brought an action claiming a declaration that he was entitled to the right of way, also damages for obstruction, and an injunction to restrain the company from interfering with his free passage. Jessel, M. R., held that the action must fail, because the company had no power to grant rights of way over land used for their railway and works. *Mulliner* v. *Midland Railway Co.*, L. R. 11 Ch. D. 611.

Except in so far as it is expressly restricted from doing so, a corporation may hold and acquire personal property, for corporate purposes.

Its powers of holding and acquiring land are restricted, not only by the special provisions of its own constitution,

but also by the provisions of a general law. At an early period, Parliament took note of the evils which resulted from the acquisition of large estates in land by corporations, and especially by ecclesiastical corporations. The statute *De viris religiosis*, 7 Ed. I., was passed to prevent land from being given in mortmain—that is, into the dead hand of a corporate society. This Act, and a long series of subsequent Acts relating to the same subject, are repealed and, in substance, re-enacted, by the Mortmain and Charitable Uses Act of 1888, which provides that land shall not be assured to or for the benefit of, or acquired by or on behalf of any corporation in mortmain, otherwise than under the authority of a licence from the Queen, or of a statute for the time being in force. Land assured to a corporation, otherwise than as the Act permits, is forfeited to the lord of whom it is held. If the lord delays to enter, the forfeiture is to the superior of whom he in his turn is the vassal. If the mesne lords all delay to enter, or if (as is usually the case) there is no mesne lord who can make out that the land is held of him, the forfeiture is to the Queen. Gifts of land for public parks, school-houses and museums, are exempted from these rules, subject to certain special restrictions contained in s. 6 of the Act [1].

There are certain modes of ownership which a corporation is, from its nature, incapable of acquiring. Thus, a corporation cannot be joint owner with a natural person, because there can be no 'benefit of survivorship' between them. Again, if a corporation purchase copyholds, the lord of the manor may refuse to accept it as a tenant, because by doing so he would be deprived of the customary payments made

[1] A certain ambiguity attaches to the word 'mortmain,' owing to the fact that the 9 Geo. II. c. 36 was commonly referred to as the Mortmain Act. The Act did not, in fact, apply to gifts in mortmain generally, but to gifts of land for charitable uses. Its provisions (as re-enacted in the Mortmain etc. Act, 1888) will be mentioned in another chapter.

from time to time to him on the death of a copyholder. It is also to be observed that a corporation seised to a use is not within the Statute of Uses.

§ 6. *Corporations Sole.*

A corporation sole consists of an official person and his successors in office. The Queen and her successors are a corporation at common law; so also a bishop and his successors, a parson and his successors, etc. Certain officials have been made corporations by statute. For example, the 39 & 40 Vict. c. 18 enacts that the Solicitor to the Treasury shall be a corporation sole, with capacity to acquire and hold lands, government securities, shares, etc., to sue and be sued, to execute deeds, using an official seal, and to enter into engagements binding on himself and his successors in office.

Every corporation sole has perpetual succession and a corporate seal. The powers and capacities of each are to be ascertained by reference to the Act or charter (if any) by which it is constituted, to the purposes for which it exists, and to the provisions of the general law.

A corporation sole may acquire and hold lands, subject to the provisions of the Mortmain Act, and to the other special rules which have been set forth in treating of corporations aggregate. A corporation sole in possession has most of the rights of an owner, but an injunction may be granted to prevent him from committing acts of irreparable waste; and his acts of alienation usually require some special form of execution or confirmation, in order to make them binding on his successors.

The common law rules in regard to personal property are much stricter than in regard to land. Neither chattels real or personal, choses in action, terms for years, nor any other species of personalty, can go in succession; and a bond,

though taken expressly to a corporation sole and its successors, would nevertheless go to the executors of the individual. (Grant on Corporations, p. 629.) The reason given for this rule is that the title to chattels ought never to be in abeyance, as it would be between the death or removal of one corporate official and the appointment of his successor.

Exceptions to the rule are permitted by special custom, as e. g. in the case of the Chamberlain of London, who may take obligations, etc. in trust for the orphans of the City. And corporations sole, created by statute, are usually empowered to hold personal property: see, for example, what is said above of the Solicitor to the Treasury.

CHAPTER V.

RIGHTS OF POSSESSION AND USER.

In discussing possession, it is necessary to distinguish carefully the following notions:—

1. Actual custody of and control over a thing; sometimes called 'physical possession.' This is a fact, and the fact may be present without giving rise to rights, as e. g. when a servant is in custody of his master's goods. But the fact may be an element in apparent or *de facto* possession; and apparent possession is title (evidence of ownership and right to possess) as against a wrong-doer.

2. Legal possession. This may exist without actual custody. A man may be in possession of land and goods, although he is many miles away from them. A person in London who receives the rent of land in Yorkshire, is in possession of the land; he stands related to it as an owner does to his property. And so long as he retains possession, he may use possessory remedies (e. g. an action of trespass) against any disturber.

3. Right to possess. This right is vested *primâ facie* in the true owner of a thing, but he may part with the right for a time, or for a special purpose, without ceasing to be owner. A man who lets his land parts with his right to possess during the term; a man who pawns his watch parts with his right to possess until the money advanced to him is repaid.

The legal remedies by means of which an owner protects

his rights are directed, for the most part, to the defence of possession, and the enforcement of the right to possess. Thus, the person having the right to immediate possession is the proper person to maintain an action of detinue or trover in respect of goods, or an action for the recovery of land.

An owner who is out of possession, and has not the right to possess, has only a reversionary interest in his property, and his remedies are restricted accordingly. If he can show that acts done in relation to the property have impaired the value of his reversion, he may obtain damages for the injury, or an injunction to restrain the acts of which he complains.

§ 1. *User of Chattels.*

The owner in possession of a chattel may use it in an indefinite variety of ways. He may take any natural fruit or increase which it yields, and any profit to be derived from it. He may destroy it, or use it so as to impair its value. We are justified, therefore, in calling him an absolute owner.

Even an absolute owner is not free to do whatever he pleases; he is bound by the law relating to contracts, torts, and crimes. He may, for example, refrain from using his goods, because he has entered into an executory agreement to sell them. He may refrain from taking his dog for a walk, lest it should bite his neighbour's sheep, and so render him liable to an action. He may refrain from firing his gun in the street, lest he should commit manslaughter. But these restrictions do not affect the extent of his proprietary rights. *Quâ* owner, he has the right to use his goods, to unchain his dog, and to fire his gun.

§ 2. *User of Land.*

According to the books, absolute ownership of land in England cannot be acquired by a subject. The feudal notion was, that all rights over land were vested originally in the

Crown. Estates in land held by subjects owed their origin, immediately or ultimately, to grants from the Crown: but no estate included all the rights which make up full ownership.

In process of time, feudal ideas were superseded by commercial ideas; the law attached less and less importance to tenure, more and more importance to the rights of individuals. A fee simple, the largest estate known to the law, now includes all rights of user and alienation; it is practically equivalent to full ownership. A tenant in fee simple is, in fact, an absolute owner of land; although the tradition of feudal tenure prevents us from saying so.

An owner of land may use it in an indefinite variety of ways. His rights of possession and user may be summarised as follows:—

An owner of land has, as such, the right to exclude other persons from it. Whether it is walled in or not, it is, in the eye of the law, a close or closed place; any person entering without the owner's consent renders himself liable to an action of trespass *quare clausum fregit*, for breaking a close.

An owner of land may use the soil at his discretion, for agricultural or building purposes. He may also excavate and remove the soil and minerals to any depth, provided that, in doing so, he does not deprive any neighbouring land of its natural support.

An owner of land may use the things which grow in the soil; the crops which he may choose to raise, the natural herbage, etc. He may cut and destroy the trees and bushes, including timber trees (oak, ash, and elm trees, more than twenty years old) which are regarded in law as forming part of the inheritance or permanent value of the land.

An owner of land may use the water which rests on or passes over his land: but if such water forms part of a definite stream in which other persons have rights, he must

not exhaust or pollute it in such a way as to injure them. An owner is free to take water percolating through his land on its way to a stream, so long as it does not actually form part of the stream.

An owner of land has the right to enjoy all the light which falls on his property in the course of nature. He may also intercept and obstruct the light in its passage to his neighbours, as e. g. by erecting buildings of any height.

An owner of land has the right to use the air which rests on and passes over his land, but he must not cause the air transmitted to his neighbours to be polluted to a degree incompatible with health and comfort. He may also obstruct the currents of air in their passage, as e.g. by building to any height.

Cujus est solum, ejus est usque ad coelum usque ad tartarum. In other words, the rights of an owner of land extend to any height and to any depth. A person who passes over it in a balloon at any height, and a person who makes a subterraneous passage under it at any depth, are both guilty of trespass.

An owner is seldom in a position to exercise all the rights which are set forth above. He is restricted in his enjoyment in so far as other persons have rights in his property.

§ 3. *Rights in the Property of another.*

Rights of possession and user in the chattels of another are usually derived from a contract or bailment. For the present, we shall not enter further into the discussion of these rights.

Rights in and over the land of another may be classified as follows:—

1. Rights derived from a licence. A mere licence to use property passes no proprietary right to the licensee. But a licensor is bound to act reasonably and fairly. If I permit a man to use a path across my field, he acquires no right of way. But if I place a dangerous obstruction on the path, I

shall be liable in respect of injury caused by his falling over it.

As a general rule, a licence may be revoked at any time. But if a licensor permits the licensee to incur expense in order to take advantage of the licence, he may in equity be restrained from revoking it.

2. Rights derived from a contract which does not operate to pass proprietary rights. An example may suffice to illustrate the nature of these rights. If I hold a race-meeting on my land, and *A* purchases a ticket of admission, he does not thereby acquire any right of way or other property right. If I prevent him from entering to see the races, I am not guilty of trespass, for *A* has no property right to be trespassed upon. I am guilty of breach of contract, and *A* has the remedies appropriate to that form of wrong-doing. See *Wood* v. *Leadbitter*, 13 M. & W. 845.

3. Rights derived from an actual or supposed grant, whereby an owner divests himself of a definite part of his proprietary rights, in favour of another.

If an owner divests himself of his rights indefinitely, he ceases to be an owner. If, for example, I make a lease of my land to *A* for 999 years, at a peppercorn rent, his interest in the land will be valuable, and mine almost valueless. But his rights are definite: I retain an indefinite residuum of right; I am still owner. If I convey my land to *A* in fee, and he makes a lease to me for 999 years, at a peppercorn rent, my interest in the land is much what it was before; but I have ceased to be owner.

A definite partial transfer of proprietary rights in land may create interests of various kinds.

(i) Estates less than fee simple. If, for example, an owner makes a lease for 21 years, the lessee has an 'estate for years' in the land. His estate includes the rights of possession and user during the term. The owner retains all the other rights

which make up full ownership; but he must not exercise them so as to disturb the lawful possession and user of the lessee. Estates less than fee simple will be described in a subsequent chapter.

(ii) Profits, or rights to take value out of the land. Some of these—rent-charges for example—are said to be in render, because they are rendered or paid by the owner of the land to the person having the right. A profit lying in render is evidently not within the scope of this chapter; it is not a right of possession and user. Others again—as, for example, the right to dig clay—are called profits *à prendre*, because the person who has the right comes on the land to take them for himself. Profits *à prendre* are rights of possession and user.

There is nothing to prevent an owner from granting the right to take value out of his land without limit. Such a right would resemble an estate rather than a profit; but, whatever their proper description, rights of this nature have in fact been upheld by the Courts. (E.g. right of a copyholder to take clay without limit, out of his holding, for making bricks to be sold off the manor. See *Marquis of Salisbury* v. *Gladstone*, 9 H. L. C. 692).

As a general rule, profits *à prendre* are limited in their nature. They are 'rights of common,' i.e. rights to be enjoyed in common with the owner, not rights to deprive him of the substance or produce of his property altogether. They may be granted as appurtenant to the ownership of neighbouring land, or 'in gross,' i.e. at large, unconnected with the ownership of land.

(iii) Positive easements, i.e. rights to use the land of another, without taking value out of it; as, for example, right of way; right of landing nets; right to draw water from a river or spring; right to discharge water, by means of a spout or watercourse, on neighbouring land; right to

transmit to a neighbour the vapours or noises of an offensive trade, etc.

It is obvious that a positive easement, granted without limit, might almost extend to depriving an owner of his property. If, e.g., a number of persons have the right to cross my field when they please, in any direction, it becomes their recreation ground; it ceases to be of any great value to me. But easements of this nature are sometimes upheld in regard to village greens, etc.

(iv) Negative easements, i.e. rights to restrict an owner in the use of his land: as, for example, the 'right to light and air,' i.e. the right to prevent a neighbour from putting up any building or any other erection which obstructs the light and air.

Easements, whether positive or negative, can only be granted as appurtenant to the ownership of property. Our law does not admit the existence of an easement 'in gross.' There must be a 'dominant tenement,' to which the right belongs, and a 'servient tenement,' over which it is or may be exercised. A right of way e.g. granted to *A.B.*, but not connected with the enjoyment of any property whereof *A.B.* is owner or occupier, would not be an easement, but a right derived from a licence or contract.

§ 4. *Claims to Profits and Easements.*

There are several grounds on which profits and easements *in alieno solo* may be claimed.

1. They may be claimed by grant. Thus, a house in a London square is sold 'together with the privilege of walking in the square garden.' Here an easement is expressly made appurtenant to the house. Sometimes the grant is implied; if, for example, a house is let to a diamond merchant, the landlord binds himself by implication not to do

anything which will obstruct the light enjoyed by the premises at the time when the lease is made.

2. They may be claimed by prescription, i.e. by immemorial usage, affording the presumption of a lost grant. 'Immemorial usage' means, in English law, usage since 1189, the first year of Richard I. But the courts took upon them to say that 20 years' enjoyment was enough to raise a presumption of immemorial usage.

3. In some cases 20 years' enjoyment was proved, but there was some evidence to show that the right was not immemorial. It might be shown e.g. that the usage had not, in fact, existed more than 50 or 60 years. In these cases, the claimants were permitted to allege a wholly fictitious grant; and a jury might be directed to find in favour of the alleged grant, on the strength of the proved 20 years' enjoyment, This was unsatisfactory; for the jury on their oaths found in favour of a deed which everybody knew had never been executed.

4. The Prescription Act, 2 & 3 Will. IV. c. 71, simplified matters by enacting that no claim to any profit enjoyed without interruption for 30 years shall be defeated by showing only that the profit was first enjoyed at any time previous to such period of 30 years. After 60 years' enjoyment the right is made absolute and indefeasible, unless it appears that the same was enjoyed by consent in writing. Similar provisions are made in regard to easements; but the periods of enjoyment are fixed at 20 and 40 years, instead of 30 and 60. In the case of an easement of light, 20 years' enjoyment gives an indefeasible right, unless it appears that the same was enjoyed by consent in writing. The Act does not take away the right to claim profits and easements by prescription at common law, or by non-existing grant.

5. Finally, profits and easements may be claimed by custom,

or local usage. Claims on this ground are permitted when, for any reason, prescription is out of the question.

Suppose, for instance, that all the fishermen of a township have enjoyed the right to draw their nets on my land. There can be no prescription; for the fishermen are an indefinite body, not capable of taking by grant; but they may be permitted to claim by custom.

A familiar instance of a claim by custom is the claim of copyholders in a manor to enjoy common of pasture over the lord's waste. A copyholder is not, in strict law, an owner; he has no permanent interest in the land to which a permanent right of common could ever have been made appurtenant by grant. But if copyholders have always enjoyed common of pasture, the law will, if possible, find a legal origin for their rights; they are therefore permitted to claim by custom.

Claims to profits and easements by custom are within the rules of the Prescription Act, set forth above. If 30 years' actual enjoyment of a profit can be shown, or 20 years' enjoyment of an easement, there is sufficient evidence of a custom.

§ 5. *Extinction of Profits and Easements.*

The modes in which profits and easements may be extinguished correspond generally to the modes in which they may be acquired.

As they may be acquired by express grant, so they may be extinguished by express release. A formal release is made by deed; but in equity a mere agreement has sometimes been held to put an end to an easement. And as easements are acquired by implied grant, they are extinguished by implied release.

Where rights of this kind are appurtenant to property, they are released by implication when the servient and the dominant tenement come into possession of the same owner. If e.g. a

man buys land over which he has a right of way, his easement is merged in his larger right of ownership. If the two properties should again be severed, there are some cases in which the right of the dominant tenement is revived by the severance. Thus, where a person becomes owner in possession of two houses, one of which discharges rain-water by means of a gutter attached to the other, the right to use the gutter will revive on a severance, unless the owner, during the period of unity of possession, has cut off the access to the gutter, or done some other act which puts a definite end to the easement. Any alteration in a dominant tenement which makes it incapable of enjoying the easement will operate a release of the easement.

Again, as profits and easements are acquired by enjoyment, they are lost by non-user. No period of time is fixed by law for this purpose; but the non-user must be so complete and so continuous as to afford evidence that the person having the profit or easement intends to abandon his right.

A profit is extinguished, of necessity, when the subject of it is exhausted. Thus, the right to dig turf naturally comes to an end when there is no more turf to dig.

Many rights *in alieno solo* have been extinguished by the exercise of general powers, given by Act of Parliament for that purpose. For example, when lands are taken by compulsion for a railway, under the Lands Clauses Consolidation Acts, the easement of a person having a right of way over the lands taken may be extinguished; but he will be entitled to compensation.

§ 6. *Illustrations.*

The following cases may serve to illustrate the rules laid down in regard to profits and easements.

Profit à prendre: rights of common. The Provost and Scholars of Queen's College were lords of the manor of Plumstead, in which

there were several greens, on which the freeholders of the manor had for at least 200 years pastured cattle and cut turf. The lords attempted to enclose the greens. Warrick and others, freeholders, brought an action on behalf of the freeholders generally, claiming common by prescription. This claim was allowed. The Prescription Act was not needed in such a case; the actual enjoyment proved was sufficient to give a title by prescription, independently of the Act. *Warrick* v. *Queen's College*, L. R. 10 Eq. 105, on appeal, L. R. 6 Ch. 716.

Easement of Support.—The 'natural easement' of support is enjoyed in respect of land in its natural state. If my neighbour builds a house on the edge of my land he does not thereby acquire any additional right against me; but if his house stands for 20 years he will acquire a right to support for it, as well as for his land.

Dalton, a builder, was employed in 1876 to build a new Probate Office at Newcastle. He dug the foundations so deep that he brought down the coach-factory of Angus & Co., which dated from 1849. The question, whether Angus & Co. could maintain an action against Dalton and his employers, was argued three times and led to an interesting conflict of judicial opinion. Finally the House of Lords decided in favour of the plaintiffs. *Angus* v. *Dalton*, L. R. 6 Ap. Ca. 740.

Water. The Croydon Local Board sunk a well in their land, and drew therefrom great quantities of water for the use of the town. By so doing, they diminished the flow of the river Wandle; but they took no water forming part of the river, or of any stream running into it. Chasemore, the owner of an ancient mill on the Wandle, sued the Clerk of the Board; but there was judgment for the defendant. *Chasemore* v. *Richards*, 7 H. L. C. 349.

Light. Bonner was the owner of a hotel, built in 1867, close to a railway. The Company wished to prevent him from acquiring a right to light as against them. They proposed, in 1882, that Bonner should pay a small rent, 'as an acknowledgment of tenancy of the easement of light.' He refused. The Company then put up a screen, on their own land, in front of his windows. Bonner com-

menced an action, and moved for an injunction to the Company to remove the screen. The Court of Appeal decided against him, on the ground that the Company were making a perfectly legal use of their own property. *Bonner* v. *G. W. R. Company*, L. R. 24 Ch. D. 1.

Air.—When air comes through a window or other opening above ground, the right to air goes along with the right to light. When air comes through a definite opening below ground (as when one cellar is ventilated through another), the right to air may possibly exist apart from the right to light. But such rights are limited to air coming through definite openings. No right is acquired by a mere general enjoyment of natural currents of air.

Webb was the owner of a windmill, built in 1829. In 1859, Bird built a school-house close to the mill: Webb brought an action against him, alleging that the school obstructed currents of air which would have passed to his mill. It was held that a claim to the free passage of every current of air was a fanciful claim, and that Webb's action could not be maintained. *Webb* v. *Bird*, 10 C. B. N. S. 268.

CHAPTER VI.

TRANSFER OF PROPERTY.

THERE is an obvious distinction between the transfer of a thing and the transfer of rights in or over a thing. Things are transferred by delivery. Small movable things may actually pass from hand to hand. Goods in bulk are usually delivered by giving up something which enables a person to obtain control over them—as e. g. by handing over the key of the warehouse in which they are stored, or by handing over the bill of lading, if they are in a ship at sea. Land and houses are, in like manner, said to be delivered when the person in possession does what is necessary to put another in possession instead of himself.

Delivery, or transfer of possession, is only one of the facts from which the rights of the parties are to be inferred. *A* delivers a thing to *B*; from this one fact we can hardly draw any legal inference; for the relations between the parties may be those of seller and buyer, lender and borrower, master and servant, etc., etc. *A* may be merely transferring the thing, without divesting himself of his rights in it, or he may be alienating the thing, that is, divesting himself of his rights and transferring them to another.

§ 1. *Conveyances.*

The form prescribed by law for transferring rights of property from one person to another is called a conveyance; and the form varies according to the nature of the property.

Freehold lands are conveyed by deed. A conveyance of copyhold land must be completed by a formal surrender of the holding to the lord of the manor, and admittance by him of the new copyholder—the surrender and admittance being duly entered on the court rolls of the manor. The formal conveyance of an equitable interest in land is made by deed.

Corporeal chattels (such as a horse, or a piece of plate) may be conveyed by delivery, coupled with an intention to pass the property. Where the owner of chattels desires to transfer the property in them, while remaining in possession of them, he must execute a deed for the purpose. Thus, if a man wishes to assign his furniture to a creditor, without actually parting with it, he may do so by means of that form of deed known as a bill of sale. If he wishes to give the furniture to his daughter, without parting with it, he may execute a deed of gift in her favour.

There are certain cases in which the law gives to a mercantile contract concerning chattels the effect of a conveyance. A completed contract for the sale of goods operates as a transfer of the property in the goods to the purchaser. In like manner the indorsement and delivery of a bill of lading operates as a transfer of the property in the goods to a person who acquires the bill of lading for value.

Government stocks are formally conveyed by entries in the books of the Bank of England. Stock and shares in a company are conveyed by a transfer registered in the books of the company or with such other forms as may be prescribed by its constitution, and by the Acts under which it has been formed.

At Common Law these transfers of shares, etc. could not have been made, for a chose in action could not be assigned so as to enable the assignee to sue for it in his own name. But this strict rule has long since given way. Negotiable instruments are freely assignable; a bill of exchange, for example,

—a contractual instrument, possessing a money value, and forming part of the property of the holder,—may be transferred by indorsement. Stocks and shares are transferred, as we have seen, by using the appropriate forms; and there are special statutory rules which govern the assignment of policies of insurance. Finally, the Judicature Act 1873, s. 25, subs. 6, permits an absolute assignment of any chose in action to be made by writing signed by the assignor, express notice of the transfer being given to the debtor.

§ 2. *Modes of Alienation.*

The modes in which rights of property are transferred from one person to another may be considered under the following heads:—

Contract.—If an owner agrees to transfer his rights for valuable consideration, justice requires that the agreement should be carried out. We have seen that a contract for the sale of goods may operate as a conveyance of the property comprised in it. In the case of land, a contract does not operate as a conveyance, but equity controls the formal acts of the parties, so as to give effect to the agreement between them. If *A* contracts to sell his land to *B*, and if there is evidence sufficient to satisfy s. 4 of the Statute of Frauds, *B* becomes the equitable owner of the land from the moment the contract is completed, and *A* will, if necessary, be compelled to execute a formal conveyance.

Equity also controls the operation of a formal conveyance so as to prevent it from having an effect not intended by the parties. For example, when an owner of land borrows money on the security of the land, he executes a mortgage, which is, in point of form, a conveyance of the land to his creditor. Equity does not regard the mortgagee as owner of the land; if the mortgagor performs his contract, by paying principal

and interest of the loan, he remains owner of the land, notwithstanding the terms of his conveyance.

Marriage is a valuable consideration. When a man marries a woman, there is consideration sufficient to support an alienation of his property by way of settlement; no matter how poor the woman may be, no matter how large the property settled. If the settlement contains provisions in favour of children, these provisions are taken to be 'within the scope of the marriage bargain.'

Gift.—An owner may transfer his rights to another by way of gift. In this case there is not the same imperative reason for giving effect to the transaction. Equity, therefore, gives no assistance to perfect an imperfect gift. If an owner wishes to transfer his property by way of bounty, he must himself and of his own will do the formal acts which are necessary to divest him of his rights. He must make a formal conveyance to the donee, or to some person in trust for the donee, or he must expressly declare that he himself holds the property in trust for the donee.

One Irons made a verbal gift of two colts to his son; but the colts remained in the father's possession until his death. The son brought an action of trover against his father's executrix, to recover the colts; but there was judgment for the defendant. To transfer the property by gift there should have been either a deed or instrument of gift, or an actual delivery of the colts to the donee. *Irons* v. *Smallpiece*, 2 B. & Ald. 551.

A *donatio mortis causâ* is a gift of personal property, made in immediate expectation of death, and intended to take effect only if the donor dies and the donee survives him. A gift by will requires (as we shall see in a subsequent chapter) to be executed with certain forms, and proved by disinterested witnesses. But a *donatio mortis causâ* requires no form, except the actual or constructive delivery of the property to the donee; and it may be proved by the

evidence of the donee himself. These rules of law have been unfavourably criticised, on the ground that they offer a temptation to fraud. Surviving relatives are apt to put their own interpretation on the words and acts of a dying man, and to find or fabricate evidence of a gift which the deceased did not really intend to make.

A gift of real property *inter vivos* is perfected by a formal conveyance or declaration of trust. But such gifts, however formally made, are always somewhat uncertain in their effect; for the 27 Eliz. c. 4 enacts that all voluntary alienations of land shall be void 'as against all persons which have purchased or shall hereafter purchase the same.' It is therefore possible for an owner of land to make a valid gift of it, and then to render his gift invalid by selling the land.

Miss Toker was the owner of an estate called The Oaks. In 1853 she made a voluntary settlement on herself for life, with remainder to her nephew Philip, who covenanted to pay the interest on certain mortgages. He removed, at his aunt's request, to The Oaks, and kept up an establishment there. In 1854 Miss Toker quarrelled with her nephew, and tried to annul the settlement. First, she tried to make out that the settlement had been procured by undue influence. *Toker* v. *Toker*, 31 Beavan, 629, on appeal, 3 De G. J. S. 487. Failing in this attempt, she sold the property to one Townend, who commenced a suit against the aunt and nephew for specific performance of the contract of sale, and contended that the settlement must be set aside in his favour. His suit was dismissed, the Court being of opinion that Philip's covenant to pay interest, and the expenses incurred by him in removing to The Oaks, were valuable consideration for the settlement; it was therefore not a voluntary settlement within 27 Eliz. c. 4. *Townend* v. *Toker*, L. R. 1 Ch. 446. If the settlement had been voluntary, Miss Toker might have upset it by selling the land, and Philip would have had no claim to the purchase money.

Abandonment.—Rights of property may be formally abandoned; as for example, when a tenant expressly surrenders his lease to the landlord, or the landlord expressly releases or parts with his reversion in favour of the tenant.

There are also cases in which rights may be informally abandoned. Suppose, for example, that a tenant, holding a lease of my land, leaves his farm before his term has expired: I resume possession, and the tenant makes no objection to my doing so. His rights in the land are transferred back to me; for his conduct is an implied surrender of his lease, and my conduct is an implied acceptance of the surrender.

Rights may be transferred and extinguished, not only by the deliberate act (formal or informal), but also by the passive neglect of the person in whom they are vested. It was pointed out in the last chapter that profits and easements may be lost by non-user; and in like manner all rights of property may be lost by an owner who neglects to assert and defend them. Long possession is a fact from which the Courts will, if possible, infer that the rights of the possessor had a legal origin.

In this connection we may consider the effect of Statutes of Limitation—i. e. statutes limiting the time within which certain actions may be brought. A few examples will show how these statutes effect what is practically, though not technically, a transfer of property rights.

A enters into wrongful possession of the goods of *B*. In this case *B* may assert his right to possess by bringing an action of detinue or trover, to recover the goods, or to obtain damages for the wrong; but he must do so without undue delay, for the Statute 21 Jac. I. c. 16 provides that an action of detinue or trover shall not be brought unless within six years after the cause of action arises. When the time limited by the statute has run, *B* is barred of the remedies

by which his rights of ownership may be asserted. The possessory title of *A* is protected against *B* by the statute, against the rest of the world by the rules of law which favour possession. There is here, strictly speaking, no transfer of rights; but new rights are now vested in *A* similar to those which were formerly vested in *B*.

A enters into wrongful possession of the land of which *B* is owner in fee simple. The appropriate remedy of the owner is an action for the recovery of the land; but the Real Property Limitation Act, 1874, provides that no such action shall be brought unless within twelve years after the cause of action arises. It is further provided, by s. 34 of the 3 & 4 Will. IV. c. 27, that when the time for bringing an action has expired, the right and title of the person who might have brought the action is extinguished. Here again there is, strictly speaking, no transfer of rights; but the rights of one owner are extinguished, and a new possessory title is created in favour of another.

Forfeiture.—This is a term used in various senses, which we must endeavour to distinguish. Take first the case of a fine or pecuniary forfeiture, imposed for the breach of some rule of law. A fine does not involve forfeiture of any specific property; it is a debt which may be enforced against the property of the offender generally.

The cases of bankruptcy and conviction for crime have been mentioned in a previous chapter. The trustee of a bankrupt, or the administrator of a convict, steps into the place of the person whose estate he has in charge, and exercises, so far as may be necessary and legal, those rights of disposition which the owner himself might have exercised, but for the disability imposed on him.

A specific piece of property, real or personal, may be forfeited by a breach of the conditions on which it is held. Here we must distinguish between two kinds of conditions.

A condition precedent is a condition to be fulfilled before the property vests in the person to whom it is to be transferred. If such a condition is not performed, or if it cannot be performed, because of its impossibility or illegality, the property does not vest at all. If, for example, land should be granted 'to *A* if he kills *B*,' *A* takes nothing by the grant, because he cannot legally perform the condition. This, of course, is not a forfeiture, for *A* never has any interest in the land to forfeit.

A condition subsequent is a condition to be fulfilled after the property has vested. If such a condition is illegal or impossible, the property is not forfeited by non-performance. Thus, if land be granted to *A* on condition that his estate is to come to an end unless he kills *B*, *A* may continue to hold the land without performing the condition.

If the act or event which is made a condition subsequent be legal and possible, the property is forfeited unless the condition is fulfilled. But in construing a disposition of property we have to distinguish between conditions, properly so called, and words which limit the duration of the interest conferred. The following illustrations will explain the nature of the distinction.

A grants his land 'to *B*, until J. S. returns from Rome.' Here *B* takes an estate for his life (for there are no words to give him the inheritance), but the return of J. S. will bring his estate to an end. This is not a case of forfeiture; it is not necessary that the grantor should resume the land, in order to put an end to *B*'s estate; it is at an end as soon as the event happens. In other words, the clause 'until J. S. returns from Rome' is not a condition annexed to the limitation, but a part of the limitation itself.

A grants his land 'to *B*, on condition that if J. S. returns from Rome the estate hereby granted shall determine.' Here *B* takes a life-estate, subject to a condition. If J. S. returns

from Rome, the condition is broken, and *A* or his heir may take advantage of the forfeiture and enter on the land. The interest of the grantee continues to subsist until the grantor enters. The grantor may waive his right to take advantage of the forfeiture.

Rights of re-entry and forfeiture are frequently inserted in leases, in order to secure the observance of the lessee's covenants to pay rent, to keep the premises in repair, etc. In such cases forfeiture is often an excessive penalty to pay for the breach committed. It is therefore provided by s. 14 of the Conveyancing Act, 1881, that if the breach is one capable of remedy, the lessor shall give notice to the lessee to remedy the breach and to make compensation. It is only on failing to obtain satisfaction in this way that the lessor may exercise his right of re-entry or forfeiture. The section does not extend to a covenant for payment of rent; but courts of equity do not permit forfeiture for non-payment of rent, if the lessee is prepared to pay the rent due and costs.

One condition annexed to the holding of land under another person is that the tenant must respect the rights of the person under whom he holds. We have seen that an owner (feudal tenant) may incur a forfeiture by making an unlawful alienation of his land in mortmain. And any tenant, whether in the feudal or the contractual sense of the word, may forfeit his holding by claiming adversely to his landlord, or by helping a third party to set up an adverse claim.

At the common law, land might be forfeited by making what was called a tortious alienation. Thus, if *A*, an owner in fee simple, granted his land to *B* for life, *B* had the freehold, and could make a feoffment or formal conveyance to *C* and his heirs; and the fee or inheritance thus transferred to *C* was a subsisting estate, until set aside. The law therefore made it a condition of *B's* estate that he should not make a tortious feoffment; if he broke the condition, *A* or his heirs

might re-enter and put an end to the interests both of *B* and of *C*. The 8 & 9 Vict. c. 106 effects the object of the old rule in a simpler way, by enacting that no feoffment is to have a tortious operation. If *B*, tenant for life, conveys to *C* and his heirs, he conveys no more than he has; *C* takes only an estate for the life of *B*.

CHAPTER VII.

PUBLIC POLICY IN REGARD TO THE TRANSFER OF PROPERTY.

PROPERTY is usually alienated either in the way of commerce, or in order to make provision for persons whom the owner wishes to benefit. Commerce and family provision are both favoured by the law; and great freedom of alienation, *inter vivos* and by will, is permitted to owners of property. But this freedom must be exercised within the limits imposed by public policy.

§ 1. *Fraudulent Alienation.*

A transfer of property may be vitiated by fraud, and that in two ways. First, it may be procured by fraud on the part of the alienee. If, for example, a solicitor takes advantage of his position to purchase his client's property under its value, the transaction will be set aside. Courts of Equity are extremely jealous in scrutinising all transfers of property which raise the smallest suspicion of fraud or undue influence.

Secondly, a transfer of property may be vitiated by fraud on the part of the alienor. By parting with his property, an owner may injure his creditors and defeat their just claims against his estate. Every alienation of property is void as against any person who by such alienation is delayed or defrauded of his rights. This is the effect of the statute

13 Eliz. c. 5; but the statute did not introduce a new rule; it is declaratory of the common law.

If property is alienated for a valuable consideration the transaction is not *primâ facie* fraudulent. But if creditors can show that it is, in fact, a fraud on them, they can set it aside. It would, for instance, be sufficient to prove that the alienor, being insolvent, had sold his property to a friend for a very inadequate price.

Alienation by way of gift is not *primâ facie* fraudulent. As in the previous case, it is for the creditors to show that the gift is, in fact, a fraud on them. But there are certain cases in which no proof of fraud need be given by the creditors. Any voluntary settlement or other conveyance made by a debtor within two years before bankruptcy is conclusively presumed to be fraudulent; it is void as against the debtor's trustee in bankruptcy. Any such settlement made within ten years before bankruptcy is deemed to be fraudulent, and is void as against the trustee in bankruptcy, unless it can be shown, (1) that the settlor, at the time of making the settlement, was able to pay his debts without the aid of the property comprised in the settlement, and (2) that the settlor's interest in the property passed to the trustees of the settlement. Bankruptcy Act, 1883, s. 47.

It must be recollected that a marriage settlement, made in pursuance of an ante-nuptial bargain, is not a voluntary settlement, but a settlement for valuable consideration. But if a man settles property on his marriage, and shortly afterwards becomes bankrupt, the court may take notice of his conduct. His order of discharge may be refused; his composition with his creditors may be disallowed, 'as in cases where the debtor has been guilty of fraud.'

Observe that a debtor making a transfer of his property is judged according to the consequences of his act, not according to the state of his mind. He may give away his property

without any intention to injure his creditors; but if they are in fact injured, the gift must be set aside.

Mr. Custance was a clergyman with a good income, and a good many debts. In 1863 he assigned a policy of insurance for £1000 to Pope and others, as trustees for his niece, Mrs. Pope. Mr. Custance died in pecuniary difficulties in 1868. Freeman, an unsatisfied creditor, filed a bill asking to have the settlement of the policy set aside. The Court saw no reason to impute to Mr. Custance any intention to deprive his creditors of a fund to which they were entitled. But, in point of fact, property was withdrawn from creditors, and dealt with by way of bounty. The settlement was declared fraudulent and void as against creditors. *Freeman* v. *Pope*, L. R. 9 Eq. 206, and 5 Ch. 538.

§ 2. *Perpetuities.*

The law permits an owner to settle his property, i. e. to give to a series of persons successive interests in the income and corpus. A settlement is a convenient form of family provision; but if owners were free to settle property as they pleased, they would tie it up (i. e. render the corpus inalienable) for a longer period than public policy would approve. An owner of land e. g. might settle it on his son, with remainders to his grandson, great-grandson, and so on, directing that none of them should take more than an estate for life. In this way the land would be kept in the family; and there would never be an owner who could dispose of it freely. Such settlements of property are called perpetuities; they are discouraged and forbidden by strict rules of law.

The common law rule as to settlements of land is, that an estate cannot be given to an unborn person for life, followed by an estate to any child of such unborn person.

Following the analogy of this rule, the courts have framed a 'rule against perpetuities,' which applies to all settlements of property, real or personal, except common-law settlements

of land. The rule is this, that property cannot be rendered inalienable beyond the period of a life or lives in being and 21 years after. The lives chosen need not be the lives of persons interested in the property. Any limitation of property which goes beyond the period indicated in this rule is wholly void.

Two modern cases may be quoted to illustrate the existing law as to perpetuities and as to accumulation of income.

Peter Thellusson by his will gave the bulk of his property to Woodford and others as trustees, directing them to accumulate the income thereof during the lives of his sons, grandchildren, etc., who should be living at his death or born in due time thereafter; to invest accumulations of income in land; and, after the death of the last survivor of the persons named, to divide the trust property into three lots, which were to be conveyed to the eldest male descendants of his three sons respectively. At the testator's death, in 1796, there were three sons and several grandchildren living. If the youngest grandchild should live to the age of seventy, it was calculated that the property would by that time amount to nineteen millions sterling. The widow and children filed a bill to have the will declared void; but the bill was dismissed. The testator had kept within the limits of the law, by directing income to be accumulated and property to be rendered inalienable during lives in being at the time of his death. *Thellusson* v. *Woodford*, 4 Ves. 227; on appeal, 11 Ves. 112.

This decision led to the passing of the 39 and 40 Geo. III. c. 98, commonly known as Thellusson's Act, which enacted that (except for payment of debts and some other purposes) no person should dispose of any property so that the income thereof should be accumulated for any longer term than his own life, *or* a term of 21 years from his death, *or* the minority or minorities of any person or persons living at his death, *or* the minority or minorities of any person or persons who would, if of full age, be entitled to the income in question. An owner may make choice of any one of the periods

specified. If he goes beyond the limits of the Act, his direction to accumulate is not wholly void, but void as to the excess.

H. Bengough died in 1818. By his will he gave estates to Edridge and others in trust, directing them as follows. 1. To receive the rents, etc. during 21 years after his death, to pay certain annuities, and to invest the surplus income in land. This direction was plainly within the limits of the Thellusson Act. 2. To stand possessed of the trust estate during a term of 120 years, if twenty-eight persons named or any of them should so long live, and during a further term of 20 years, in trust for G. B. for 99 years if he should so long live, and after his death in trust for a succession of other persons in like manner. The object of these terms was to suspend the inheritance, i. e. to postpone the time when some person would acquire an estate which would enable him to part with the land. This direction was also held good, the gifts being all subject to the continuance of lives in being at the testator's death. 3. To convey the estates to the person entitled to them at the end of the specified terms. This ultimate gift was also held good. *Bengough* v. *Edridge*, 1 Sim. 173. This judgment was affirmed on appeal: *Cadell* v. *Palmer*, 1 Cl. & F. 372. It appears from this case that a settlor may count on being able to tie up his property for a period of 70 or 80 years.

§ 3. *Useless Dispositions.*

The policy of the law requires that property should be turned to use, and made a means of benefit; and it seems that the Courts will not assist an owner to make his property absolutely useless.

Mrs. Burdett by her will devised her house to trustees, directing them to have the doors and windows bricked up, and to keep the house (except four rooms) in that condition for 20 years. One of the trustees commenced an administration suit. Bacon V. C. said: 'I think I must unseal this useless undisposed of property. There will be a declaration that the house and premises were undisposed of by the will, for the term of 20 years from the testatrix's death.' *Brown* v. *Burdett*, L. R. 21 Ch. D. 667.

§ 4. *Gifts to Charities.*

The Mortmain and Charitable Uses Act, 1888, repealing and superseding previous legislation on the same subject, provides that every assurance of land (or of personal estate to be laid out in the purchase of land) for any charitable uses shall be made in accordance with the requirements of the Act, and unless so made shall be void. Any such assurance must be made to take effect in possession, without any power of revocation or provision for the benefit of the assurer. It must be made by deed, executed in the presence of two witnesses, and (unless made for valuable consideration) it must be executed at least twelve months before the death of the assurer, and the deed or instrument declaring the charitable uses must be enrolled in the Central Office of the Supreme Court, within six months after the execution of the deed. A gift of stock in the public funds must be made by transfer in the public books kept for that purpose, at least six months before the death of the assurer. Special exemptions are made in favour of gifts for public parks, elementary schools, and museums, and in favour of the Universities and Colleges named in the Act.

'Charitable uses' are defined by reference to the 43 Eliz. c. 4. They include not only gifts for relief of the poor, but also gifts for repair of highways and other public purposes.

Gifts of land are within the foregoing rules; so also are gifts of 'impure personalty,' i. e. of money so charged on land as to give the person beneficially entitled an interest in the land. These interests are within the policy of the Act of 1888, for, if a man were permitted to create by will a charge on his land in favour of a charity, he could easily, under colour of a charge, make a gift of the land itself. If, for instance, an annuity of £100 were charged on land worth £50, the heir would of course let the annuitant take the

land. But the policy of the law does not extend to all moneys secured on land. The holder of shares or debentures of a railway company has, in a sense, an interest in the land occupied by the company. But his share or debenture is, in effect, an interest in a commercial undertaking; it is therefore regarded as pure personalty (compare *Bligh* v *Brent*, ante p. 9).

An owner is free to give the whole or any part of his personal property *inter vivos* or by will, to be spent for charitable purposes.

A gift of property for the perpetual maintenance of a charity is exempted from the rule against perpetuities. If such a gift consists of personalty, the only question to be considered is, whether it is charitable or not—in other words, whether there is a public benefit sufficient to justify a departure from the general rule against rendering property inalienable. If, for example, a fund be given to provide for keeping a family tomb in repair, the gift is good, if the tomb be inside a church; for the parishioners derive a certain benefit from having the monument kept in proper repair. But if the tomb be outside the church the gift is void.

§ 5. *Superstitious Uses.*

Superstition is a general name for religions and religious practices not tolerated by the law; and gifts for the encouragement of superstition are contrary to the policy of the law. At the time of the Reformation, special laws were made against the endowment of priests to say masses for the dead: see 23 Hen. VIII. c. 10 and 1 Edw. VI. c. 14.

Down to the year 1689, only one form of religion was tolerated by law. By a long series of Acts of Parliament toleration and protection have been extended to Protestant Dissenters, Roman Catholics and Jews. A gift to a school

or charity or other general purpose connected with any of these religious bodies is recognised as a charitable gift, and is not void on the ground of superstition. But there are still certain special religious purposes which the law refuses to carry out. For example, a bequest of money to a priest to say masses for the soul of the testator is void.

§ 6. *The Seisin of the Freehold.*

To understand the modern law of real property, it is necessary to take note of certain rules of feudal policy. In feudal times, each separate freehold had its terre-tenant. He was seised of the land; he was liable for the services by which it was held; and he was the only party against whom a real action could be brought. If he parted with the freehold, custom required that he should do so by making livery of seisin to the alienee. From the importance of seisin, the common law deduced rules which restricted an owner in making a disposition of land.

First, it was said, *Nemo potest esse agens et patiens.* A man cannot deliver a thing to himself. If, for instance, an owner in fee wished to make a settlement on himself for life, with remainder to his son etc., this could not be done at common law. For a life estate in possession could only be conferred by delivering seisin to the grantee, and the settlor could not deliver to himself.

Again, it was forbidden to grant a freehold estate, to commence at a future time, if the effect of the grant was to leave the seisin vacant during the interval. It followed from this rule that a contingent remainder—that is, a remainder in favour of a person who was not in being, or not ascertained, or not entitled to take immediate possession by the terms of the gift—must be vested in some person clearly entitled to take at the moment when it became an interest in possession. If the remainder did not become vested

in possession in due time it failed; because if the law were to wait till it should be vested in possession the seisin must be left vacant during the interval.

Dispositions of land which transgress these rules are forbidden by the common law; but they are permitted and rendered possible by rules of equity and statute law. A man could not convey to himself, but he could create a trust in favour of himself for life, with remainder to another. And gifts which would have been invalid if made by way of contingent remainder in a conveyance at common law, were valid if they occurred in a conveyance to uses or in a will.

It is necessary to bear in mind that the common-law rules about seisin are still in force, except in so far as they have been modified by equity or statute.

CHAPTER VIII.

ESTATES AND INTERESTS IN LAND.

An estate is the state or legal relation in which a person stands to a thing in which he has rights of property—or, in other words, the quantity of interest he has in the thing. It is usual to speak of things themselves as estates; thus, a landowner says 'my estate,' meaning 'the land in which I have an estate'; and, in like manner, chattels are said to form the 'personal estate'-of their owner.

In construing a deed or a will, we endeavour to ascertain what is the quantity (i. e. the extent and the duration in time) of the interest given to each party taking under the instrument. To solve this question rightly, we must observe that the words and phrases employed are:—

1. Words of purchase (perquisitio) which point out, by name or description, the persons who acquire (perquirunt) an interest in the property.

2. Words of limitation, which mark out the quantity of the interest given. Thus if land be granted by deed to *A* 'in fee simple,' the words 'in fee simple' are words of limitation; and s. 51 of the Conveyancing Act makes this a sufficient description of the estate of inheritance given to *A*. If the grant were 'to *A* and his heirs,' the effect would be the same; the heirs would take nothing by purchase; the

words 'and his heirs' are used to mark out the quantity of interest given to *A*.

Interests in property are sometimes given without any words of limitation: in this case we must infer the quantity of interest taken from the nature of the property given and of the instrument disposing of it. A gift of personal property without words of limitation is a gift of the corpus. A devise of land by will, without words of limitation, is taken to be a gift of all the interest the testator had to dispose of, unless a contrary intention appears in the will. A grant of land by deed to *A*, without words of limitation, gives *A* only an estate for life. Some technical words, such as 'in fee simple' or 'and his heirs,' are necessary to pass the inheritance by deed.

3. Words attaching conditions to the enjoyment of the property, or giving directions as to the mode of enjoyment.

Shelley's Case turned on the question whether certain words were words of purchase or of limitation. In 1554 Edward Shelley, desiring to settle his lands, covenanted with Cowper and Martin to suffer a recovery (i.e. to let judgment go against him in a collusive action). The recovery was to be 'to the use of E. S. for his life, then to the use of Caril and others for 24 years, then to the use of the heirs male of the body of E. S.' There were two sons of E. S., Henry and Richard. At the death of the father in October 1554, Henry was already dead, leaving one child, a daughter. Richard, as 'heir male of the body of E. S.,' entered on the land, and let it to Wolfe. In December 1554, a posthumous son was born to Henry: this son afterwards entered and ejected Wolfe. The law stood thus: if Richard was in by purchase, his nephew could not turn him (or his tenant) out. If he was in by descent, his nephew *could* turn him out. Richard contended that he was in by purchase. 'I was the heir male of my father's body at his death,' he argued; 'the words of the covenant indicate me as the person to whom the estate was given.' But the judges held that the covenant must be read as if it ran 'to E. S. and the heirs male of his body.' The effect of that form of words

was to give E. S. an estate in tail male, there was no gift to the heirs at all. Edward's estate tail descended to Richard; but when Henry junior was born, the law of descent took the estate to him.

The 'rule in Shelley's Case,' as stated in the report of the argument, is this: 'Where the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, in such cases "the heirs" are words of limitation of the estate and not words of purchase.'

If, however, an equitable estate for life be given to the ancestor, and the legal estate is, by the same instrument, given to the heirs, in this case the word 'heirs' is a word of purchase. There is a separate and distinguishable gift to the heirs; their interest will not coalesce with that of their ancestor so as to give him an estate of inheritance. See the notes to *Shelley's Case*, Tudor L. C. 424, and a lucid exposition of the rule in Challis on Real Property.

Cases sometimes arise which turn on the question whether words are words of limitation or words which impose a condition.

J. H. Machu by his will devised a freehold to his daughter and her heirs, subject to a proviso that, if she became bankrupt, the devise should be void. The property was sold to a Company; but there was some doubt whether the daughter should have the money. If the proviso was part of the limitation, she was not full owner; she had an interest determinable on bankruptcy. Chitty, J., held that the devise gave the daughter the fee simple; that the proviso was in the nature of a condition subsequent, and (being inconsistent with the nature of the interest given) was void; that the purchase money, therefore, must be paid to the daughter. In re *Machu*, L. R. 21 Ch. D. 838.

We may now proceed to enumerate the forms of limitation commonly found in deeds and wills disposing of land.

§ 1. *Estates of Inheritance: Fee Simple, etc.*

An estate of inheritance is commonly called an estate in fee. The word *fee* is the same as *feodum* or *feudum*, but it has now no reference to feudal tenure. As there is no limit to the possible devolution of an estate from one heir to another, an estate in fee is one which may by possibility endure for ever.

If land be granted 'to *A* and his heirs,' *A* has an estate in fee simple. This is the largest estate known to the law. Subject to any special restriction (e. g. a condition subsequent, on breach of which the grantor may re-enter and take away the estate) *A* may exercise to the full all the rights of an owner. He may alienate the inheritance, or impair its value by acts of waste, because it is his own.

If there were no fee but fee simple, this part of our subject would present no great difficulty. But the limitation 'to *A* and his heirs' may be modified in such a way as to give rise to other estates. Two of these require special mention.

1. Determinable Fees.—A fee may be made determinable on the happening of an event. But the event must be one which may by possibility never happen; otherwise the estate would not correspond to the description of a fee given above. It would not be an estate 'which may by possibility endure for ever.' Take for instance the form of grant 'to *A* and his heirs, lords of the manor of Dale.' *A* and his heirs may always continue to be lords of that manor; *A's* estate may endure for ever. But if *A* or any of his heirs should cease to be lord, the estate given with words of limitation as quoted would come to an end.

Or take this limitation, in a settlement made by *A*, an owner in fee simple, on the occasion of his marriage, 'to the use of *A* and his heirs until the solemnisation of the intended marriage and after the marriage to the use of *A* for life,'

etc., etc. The marriage may never take place; the estate to *A* and his heirs until the marriage may endure for ever. But if the marriage takes place, *A's* estate of inheritance comes to an end, and is replaced by the estates created by the settlement.

The owner of a determinable fee has the same rights of user and alienation as a tenant in fee simple. But he cannot alienate more than he has; any interest in the land which he grants is granted subject to the determination of his own estate.

2. Fee conditional at common law.—If land were given 'to *A* and the heirs of his body' or 'to *A* and the heirs male of his body,' the common law regarded the words after 'heirs' as being in the nature of a condition. *A* was not to have an estate of inheritance unless he actually had an heir of the specified kind. As soon as such heir was born, the condition was fulfilled; *A* acquired all the rights of an owner in fee simple; only the descent of the estate was governed *per formam doni*; it went, not to the heir general of *A* but the heir indicated by the form of the gift. If, for instance, the limitation were 'to *A* and the heirs male of his body,' and *A* left daughters but no son, the daughters could not take the estate, though they could take land which *A* held in fee simple.

This form of estate is almost entirely obsolete; but the foregoing sentences are necessary by way of introduction to the following paragraphs.

§ 2. *Estates of Inheritance: Fee Tail.*

The statute of 13 Ed. I, *De Donis Conditionalibus*, begins by reciting that tenements many times are given on condition, as e. g. to a man and his wife and the heirs of their bodies; and that in such cases, after issue born, the donees have power to aliene the tenement and to disinherit their issue,

contrary to the minds of the givers. It is therefore enacted that in such cases the will of the giver shall prevail, so that the tenement shall remain to the issue of those to whom it was given, or revert to the donor if issue fail. (The term 'tenement' includes land and any rights in land which may be the subject of tenure.)

The effect of the statute is to cut down (French, *tailler*) that estate, called a conditional fee, which we have just been considering, and to convert it into an estate tail.

The object of the statute was to render land inalienable, and, as this was contrary to the policy of the law, the courts evaded the express rule of the statute by means of certain collusive actions at law called Fines and Common Recoveries. These actions were cumbrous, uncertain, and expensive; they were therefore abolished by the 3 & 4 Will. IV. c. 74, which substituted a deed for the forms previously in use. The effect of these changes in the law is as follows :—

A tenant in tail may, by deed enrolled in the Central Office of the Supreme Court, bar the rights of the issue in tail. If *A* being tenant in tail makes a grant, by deed enrolled, 'to *B* and his heirs,' the issue of *A* cannot defeat the conveyance. *B* acquires what is called a base fee; his estate is one which descends to his heirs general; it may endure for ever, but it will come to an end in case the issue of *A* should fail.

A tenant in tail *in possession* may, by deed enrolled, dispose of the estate so as to bar the issue in tail, *and* all persons having interests expectant on the determination of the estate tail. Suppose that *A*, being tenant in fee simple, grants to *B* and the heirs of his body, with remainder in fee simple to his own heirs. *B* enters into possession and executes a disentailing assurance, i. e. a deed duly enrolled. By doing so he enlarges his own estate into a fee simple; he bars not only his own issue but the heirs of *A*.

A tenant in tail, not in possession, may bar the rights of his issue; he is e. g. in a position to create a base fee. But he cannot enlarge his estate into a fee simple, unless he has the consent of the protector of the settlement. The protector may be a person or persons (not more than three) appointed by the settlor. If no protector is appointed, the person who takes the first estate prior to the estate tail is protector, provided that his estate is an estate for years, determinable on the dropping of a life or lives, or some greater estate: 3 & 4 Will. IV. c. 74. s. 22. Suppose that land is given to *A* for his life, with remainder to *B* and the heirs of his body. During the life of *A*, *B* can dispose of his remainder, so as to bar the rights of his own issue; he cannot absolutely disentail, unless with the consent of the protector; and (if no protector has been appointed) *A* is protector by statute. On the death of *A*, *B* enters into possession and may disentail at his own discretion.

A tenant in tail in possession is not restricted as to the user of the land. He is owner of the inheritance, and may commit acts of waste. He may also exercise the rights of sale, exchange, etc. given to a tenant for life by the Settled Land Act, 1882. He bars no rights by doing so; he merely changes the nature of the settled property. If, for instance, he sells the land, the purchase money will be settled just as the land was settled before.

If the remainder or reversion expectant on the determination of an estate tail is vested in the Crown, the tenant in tail cannot make any of the dispositions authorised by the Act for abolishing Fines and Recoveries.

Estates tail are divided into several classes, according to the description of heirs included in the entail. A grant 'to *A* and the heirs of his body,' or 'to *A* in fee tail,' creates an estate in tail general: a grant 'to *A* and the heirs male of his body,' an estate in tail male. It is also possible to create an

estate in tail female. If an estate be given to *A* and the heirs of his body by a particular wife, this is an estate in tail special. If the wife dies without leaving issue, *A* is 'tenant in tail after possibility of issue extinct'; his rights are, generally speaking, those of a tenant for life, and he is not permitted to enlarge his estate into a fee simple, by deed enrolled or otherwise.

§ 3. *Estate for Life.*

An estate for the life of the grantee is not exactly limited in point of time. It was considered of old to be an estate suitable to the rank of a freeman; in other words, it is an estate of freehold.

A tenant for life has not the inheritance, and therefore he is, at common law, not entitled to alienate the inheritance or to commit acts of waste which impair its value. He may take the profits of the land and dispose of it while he lives; but he must not open mines or cut timber (unless timber taken for immediate use, under the name of *estovers*).

If the tenant for life is a lessee who has taken a lease for his own life, he is bound by these restrictive rules, except in so far as he has stipulated to the contrary. He has virtually bought a limited kind of interest in the land, and there is no reason to relax the terms of his bargain.

The tenant for life of a settled estate is in a somewhat different position. While he is in possession, he is the managing landlord, and the acting head of the family to which the estate belongs. It has therefore been customary for settlors to give the tenant for life certain powers over the inheritance, e. g. the power to grant long leases, or the power to charge the land with portions for younger children.

If the settlor says that tenant for life is 'without impeachment for waste,' these words will empower the tenant for life to open mines and cut timber. But there are certain acts

(the destruction of the family mansion, for example) which a court of equity will restrain the tenant for life from committing, even if he is 'without impeachment for waste.' These acts are, somewhat absurdly, called acts of 'equitable waste.'

The powers given by settlements to tenants for life are now re-enforced by the very extensive powers given by several Acts of Parliament, and especially by the Settled Land Act, 1882. Under that Act the tenant for life may sell or exchange the land comprised in the settlement; he may also grant long leases. He may, in short, turn the inheritance into money as if he owned it. But he may not deal with the money as his own. It is capital money, to be kept for those who come after him; or employed for their benefit in improving the land or in freeing it from incumbrances. The tenant for life will take the income of the settled property, whether that property remains in the form of land or is turned into capital.

§ 4. *Estates pur autre vie.*

If *A* being tenant for life grants his estate to *B*, it is plain that *B* has an estate for the life of *A*, an estate *pur autre vie*. This is an estate of freehold; though it may come to an end in the lifetime of the grantee, if the grantor dies before him. *A* is called *cestui que vie* (he that lives, he whose life is the measure of the estate).

Again, if *A* make a grant of his land to *B* for the life of *C*, the estate of the grantee is an estate *pur autre vie*; and *C* is *cestui que vie*. It is important to observe that a grant for life or lives gives the grantee an estate of freehold. A lease for life or lives gives the lessee an estate of freehold; a lease for a fixed term of years gives (as we have already seen) only a chattel interest in the land.

The rights of tenant *pur autre vie* are, generally speaking, similar to those of a tenant for life. If his title is derived

from a lease, his rights will depend on the terms of the lease: if it is derived from a settlement, he is a tenant for life within the meaning of the Settled Land Act.

If *cestui que vie* dies, the tenant may be tempted to conceal the fact. Remainder-men and others, if they suspect such concealment, may obtain an order for the production of *cestui que vie* before commissioners appointed for the purpose: 6 Anne, c. 72.

If tenant *pur autre vie* dies in the lifetime of *cestui que vie*, it becomes necessary to determine how the portion of his estate which remains shall be disposed of. He may have disposed of it himself by will; in this case the devisee will take it. If it be not devised to any person, we must look to the terms on which it was originally granted. If, in the first illustrative case given above, *A*, being tenant for life, has granted his estate 'to *B* and his heirs,' and *B* dies before *A*, the heir of *B* will take the estate as special occupant[1]: not by descent but by purchase, as the person named in the grant to take after *B*. If there be no person entitled to take it as special occupant, the estate will go to the executor or administrator of *B*, and will be applied and distributed as if it were personal estate: Wills Act, 1837, s. 6.

§ 5. *Estates less than Freehold: Estate for years.*

It has already been explained why an estate for a definite term of years is always less than full ownership, and why it is only a chattel interest, and not real property. It is not an estate of freehold, because in early times there were only two estates which were considered suitable to the position of a free tenant—an estate of inheritance and an estate for his life.

[1] At common law, if the heir was not named in the grant, and if the possession was vacant at the death of tenant *pur autre vie*, any stranger might enter and take the estate as general occupant. This rule is now obsolete, as the text sufficiently shows.

A term or estate for years may be created by a contract of lease; in this case the rights of the parties are ascertained from the agreement between them. An agreement for a lease must be proved by writing sufficient to satisfy s. 4 of the Statute of Frauds. In equity, the agreement is sufficient to vest the term in the lessee, without the execution of a formal lease; and in practice many tenants are content to have an agreement, without requiring the landlord to execute a lease. In order that the public revenue may not suffer by such arrangements, it has been enacted that an agreement for a lease must be stamped as if it were a lease.

A formal lease must be made by deed, unless it be a lease for a term not longer than three years, at a rent not less than two thirds of the improved value of the land.

Subject to any special stipulation in the contract, the rights transferred to the lessee are: all rights of possession and user during the term; and the right to assign the term, or to sublet. If a lessee assigns, he remains liable on the covenants and conditions of the lease. If he sublets for the whole of his term, the subtenant steps into his place, and he is freed from liability. But the right to assign or sublet is almost always in practice restricted by the terms of the agreement between landlord and tenant.

An estate for years, when created by lease, is usually an estate on condition, and the lessor may put an end to it on breach of any condition, subject to the rules already set forth in chapter VI. An estate for years may also be so limited as to come to an end, without any act of the grantor, on the happening of an event. Thus, an estate 'for 99 years, if *A* shall so long live,' comes to an end on the death of *A*. In the case of *Cadell* v. *Palmer, ante* p. 68, we had occasion to show how such terms may be used for the purpose of 'suspending the freehold.' It is to be observed in such cases that a person who is in possession of land, if entitled to a term determinable

on life, may exercise the powers of sale, etc. conferred on a tenant for life by the Settled Land Act, 1882. See s. 58 of the Act.

Terms are also used for the purpose of enabling trustees and others to raise sums of money, e.g. a person may give to trustees a term of 500 years in his land, in trust to raise £5,000 for portions for younger children; subject to this term, he may devise the land to his eldest son for life, with remainder to his grandson, etc. Here the object of the term is, not that the trustees should actually hold the land for 500 years or for any time at all, but simply that they should have such an interest as will enable them to raise the £5,000, with or without the consent of the tenant for life. In like manner, a term may be granted to a mortgagee, to enable him to obtain payment of money advanced on security of the land. When the purpose of the arrangement has been answered—when the money has been raised, or the debt paid off—the term is said to be satisfied. A satisfied term may be dealt with in several ways. It may be surrendered to the owner of the inheritance; in this case it merges in the inheritance, and comes to an end. If it is not merged, it becomes attendant on the inheritance; it follows the limitations of the inheritance, so that the person entitled to the land is also entitled to the benefit of the term. The term may be made attendant by express declaration, e.g. by assigning it to a trustee, in trust to attend the inheritance. If there is no express declaration, it becomes attendant by construction of law. The 8 & 9 Vict. c. 112 provides that a satisfied term which became attendant before the 31st Dec., 1845, shall absolutely cease and come to an end on that day. But if it became attendant by express declaration, it still subsists, for the purpose of affording to any person the protection which it would have afforded if it had continued to subsist but had not been assigned or dealt with after the date mentioned. The nature

of the 'protection' here mentioned may be explained by means of a supposed case. *A*, owner in fee, dies in 1840, having given his land by will to *B* for 500 years, in trust to raise £1,000, and, subject to the term, to *C* and his heirs. In 1842, *C* makes a charge on the land in favour of *D*, by means of a deed to which *B* is not a party. In 1843, *E* purchases the land from *C*, without notice of *D*'s incumbrance; £1,000 is paid over to *B*, and *E* obtains an assignment of the satisfied term to a trustee for himself in trust to attend the inheritance. The term has priority over the estate of *C*, and therefore over the incumbrance created by *C*; and as *E* had no notice of the incumbrance, there is no equity to prevent him from taking advantage of the term to postpone and defeat the rights of *D*.

While preserving rights which came into existence before it was passed, the Act takes away the rule under which such rights were acquired. A satisfied term becoming attendant at any time since the 31st Dec., 1845, ceases and comes to an end for all purposes.

§ 6. *Estate at Will.*

An estate at will is the estate of a person who has possession of the land of another with his consent, to hold at the will of both parties. Such an estate may be created by agreement, or by acts sufficient to indicate the will of the parties. An estate or interest created by livery of seisin only, without writing, is an estate at will. Statute of Frauds, s. 1.

A tenant at will has rights of possession and user while his tenancy continues. He is bound to act reasonably; if he goes beyond his rights—as e.g. if he commits voluntary waste, or attempts to assign to another—he forfeits his interest. If he undertakes to pay rent, he cannot escape liability by leaving before the time for payment arrives.

A tenant, having power to determine his lease, who gives notice of his intention to quit, and does not deliver up

possession at the time he mentions, is liable for double rent for such time as he continues in possession. 12 Geo. II. c. 19. s. 18.

The landlord of a tenant at will may turn him out at any moment, by giving him notice to quit, or by entering on the land to exercise rights of ownership. But he must act reasonably towards his tenant. If he allows the tenant to sow the land, he must also allow him to cut and carry away the crop; or he must give him reasonable notice to quit.

If the landlord agrees with the tenant for an annual rent, 'reasonable notice' means half a year's notice, ending with a current year of the tenancy. In cases within the Agricultural Holdings Act, 1883, s. 33, a year's notice is required. A tenant entitled to so long a notice is not a mere tenant at will, but a tenant from year to year. He has not, however, an estate for years, for the term of his occupation is not fixed; it may be terminated by notice at the end of any year.

§ 7. *Estate on Sufferance.*

An estate on sufferance is the estate of one who acquires or retains possession of land, without positive wrong-doing, but at the same time without any lawful title. Thus, if tenant for years continues to hold after his term has expired, he holds only because his lessor delays to put him out. Therefore it is said that a man cannot be tenant on sufferance under the Crown; because delay or neglect is not to be imputed to the king.

The rights of a tenant on sufferance hardly admit of detailed description. If he retains possession of agricultural land, for example, his rights are evidently of no value unless the landlord continues to acquiesce in his occupation; and such continued acquiescence is enough to change the nature of his interest, and make him a tenant at will.

If, on the other hand, the landlord plainly indicates his

intention to resume possession—as e. g. by entering on the land, or by giving the tenant notice to quit—the tenant, if he continues in possession, is a wrong-doer, and may be treated as such.

If a tenant for life or years, or any person claiming under or by collusion with such tenant, wilfully holds over after determination of the term, and after demand made and notice in writing given by the person to whom the remainder or reversion belongs, the person holding over shall pay the person kept out of possession at the rate of double the yearly value, for so long time as the premises are detained. See the 4 Geo. II. c. 28.

CHAPTER IX.

DERIVATION OF ESTATES IN LAND.

A PIECE of land is a thing which has a permanent identity. If the deeds relating to it have been duly preserved, the owner can trace back his title through a series of previous owners, each of whom has taken his rights from a predecessor in title and transmitted them, or allowed them to pass, to a successor in title.

Every piece of land has an owner in fee simple. But if, for any reason, estates less than fee simple have been created by the owners, we have to distinguish separate interests in the same land, and these interests are either in possession, or in expectancy, or contingent. Two or three simple cases will indicate the types to which such interests conform.

A, an owner in fee simple, conveys to *B* for 99 years. In this case, *B* has a smaller estate, derived out of the larger estate, which remains vested in *A*. *B* and his successors in title have possession during the term; *A* and his successors in title have the *reversion* in fee simple—the land reverts to them at the end of the term not by express grant, but by operation of law.

A, an owner in fee simple, conveys to *B* for his life, with remainder to *C* (an existing person) and his heirs. In this case, *B* has a smaller estate in possession, derived out of the fee simple. The *remainder* in fee simple, expectant on the determination of *B's* estate, is vested in *C*.

A, an owner in fee simple, conveys to *B* for his life, with

remainder to the heirs of *C* (a living person). The heir of any person is not ascertained until his death; the remainder in this case is therefore contingent; it is a subsisting interest, but it is not, as yet, vested in an ascertained person.

A, an owner in fee simple, devises his land by will to *B* for his life, with remainder to his eldest son in tail, etc. *B* is to assume the name and arms of *A*; if he fails to do so within a year, the will directs that the interests given to him and his son, etc. shall be taken away, and the land shall go to *C* for his life, with remainder to *his* eldest son, etc. In this case the interests given to *C* and his son, etc. are executory. If *B* fails to comply with the 'name and arms clause,' the interests given to *C* and his son, etc. will be executed—they will become subsisting estates in possession and in remainder.

The general object of settlements is to fix the future devolution of property, so far as the rules against perpetuities will admit. This object is attained by creating estates in possession and reversion; vested and contingent remainders; and executory interests. These limitations depend for their validity either on rules of common law, or on rules of equity, or on statute law.

§ 1. *Derivation of Legal Estates.*

The form of a settlement of land at common law is determined by the rules in regard to seisin which we have already had occasion to consider. A settlor parts with his seisin once for all, and points out a series of persons who are to take it in uninterrupted succession, so that there may always be a tenant to perform the feudal services.

The settlement must begin with a 'particular estate' of freehold, because it is only to a freeholder that the settlor can transfer his seisin. After the 'particular' estate for life or estate tail, remainders may be limited. Remainder-men

derive their seisin from the settlor; remainders therefore must be created at the same time as the particular estate, for the settlor can only part with his seisin once.

A remainder, expectant on the regular determination of the preceding estate, is the only form of freehold estate *in futuro* which the common law could allow to be created. If a settlor begins by giving *A* an estate for life, he can limit remainders after *A's* estate, but he cannot, at common law, make a limitation which would, in any other manner, shift the seisin from *A*. Thus, if the grant were to *A* for life, and, if *B* shall pay to *A* £100, then to *B* for life, the limitation in favour of *B* would be void at common law.

These rules are of special importance in their bearing on contingent remainders. Suppose, for instance, that *A*, an unmarried person, is tenant for life, with remainder to his eldest son. Before having a son, *A* may forfeit or surrender his estate, or he may acquire a larger estate, in which his life interest will be merged; in any of these events, his life estate comes to an end; the 'eldest son' is not there to continue the seisin, and the remainder therefore cannot take effect. But this rule of common law is now set aside by the 8 & 9 Vict. c. 106, which enacts that a contingent remainder shall be capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold [1].

But the rule which prevented a contingent remainder from taking effect, unless it was vested in possession at the moment when the preceding estate was determined, applied to other cases which were not provided for by the Act just cited. Take, for instance, the case of *Cunliffe* v. *Brancker*, L. R. 3 Ch. D. 393.

[1] Before the statute, the rule of common law was excluded by an equitable device. 'Trustees to preserve contingent remainders' were inserted between the life estate and the remainder.

Edmund Leigh by his will gave lands to trustees for a term of 120 years, if his niece Sarah Cunliffe should so long live, in trust to pay her the rents, and after the expiration of the term in trust for her husband for his life, with remainder to those of her children who should be living at her death. The husband died in 1871 and his wife survived him. At the death of the husband it was, of course, still uncertain which of the children would be living at their mother's death. There were therefore no *ascertained* persons ready to take the seisin immediately after their father; the contingent remainder failed; the law set aside the gift to the children, and let in the heirs of Edmund Leigh.

In this case, the plain intention of the testator was frustrated by an arbitrary rule of feudal law. The case was tried in 1876, and in the following year Parliament amended the law by enacting (40 & 41 Vict. c. 33) that a contingent remainder should take effect as if it had been created in the form of a springing or shifting use, or executory devise, or other executory limitation. The gift to the children in *Cunliffe* v. *Brancker* failed, because it was made in the form of a legal remainder, and therefore subject to the rules of common law. The Act of 1877 provides that such gifts, even when made in legal form, shall be construed according to the less rigid rules which apply to executory limitations.

All legal remainders are subject to the rule already laid down, that an *estate for life,* given to an unborn person, may not be followed by an estate *to the issue of such person.* It appears therefore that the strictest family settlement possible at common law is one which gives an *estate tail* to an unborn person; for that limitation will carry the land to the issue of an unborn person; unless the entail is barred.

Legal remainders are not within the rule against perpetuities laid down in *Cadell* v. *Palmer.* It is not necessary that they should be, for the rule set forth in the preceding paragraph is sufficient to prevent land from being made inalienable by means of legal remainders. Suppose, for instance,

that land is granted to *A* in tail, with remainder to *B* in fee simple. *A's* estate tail may endure for centuries; the vesting of the fee simple in possession may be postponed for centuries. But any tenant in tail in possession may acquire the fee simple, and destroy *B's* remainder, by executing a disentailing deed. *B's* remainder is therefore no obstacle to alienation.

§ 2. *Derivation of Equitable Estates.*

'Equity follows the law.' If land is granted to *A* in trust for *B* and his heirs, *B* is an equitable owner in fee simple. Smaller equitable estates, in possession, reversion or remainder, may be derived out of his fee simple, just as legal estates of a like character may be derived out of a legal fee simple; and the rights which belong to an equitable estate are analogous to those which belong to the corresponding legal estate.

But a merely equitable owner is not a *tenant* in fee simple. The person in whom the legal estate is vested (the trustee) is the person who has the lawful seisin. The continuity of the seisin being thus provided for, limitations of equitable estates are not subject to the strict rules which apply to legal remainders. It is not necessary that an equitable remainder should be created at the same time as the estate which precedes it. Nor is it necessary that an equitable remainder should be ready to take effect at the moment when the preceding estate is determined. In *Cunliffe* v. *Brancker*, if the testator had given the legal fee to his trustees, the estates given to Cunliffe and his children would have been equitable, and the remainder to the children would have been perfectly good; as the following case will show.

J. Gingell by his will directed his trustees to pay his debts, and devised a farm to them, in trust for his daughter Dinah for her life, and after her death in trust for such of her children as should

attain the age of twenty-one. The testator died in 1838; Dinah married in 1857 and died in 1864, leaving three young children. If the gift to her children had been a legal remainder, it would have failed: for at her death none of them had attained the age at which they were to take. But it was held that the direction to pay debts was sufficient to vest the legal ownership of the land in the trustees; Dinah's estate, and the remainder to her children, were therefore equitable; and each child was entitled to one-third of the property on attaining twenty-one. *Marshall* v. *Gingell*, L. R. 21 Ch. D. 790.

Equitable remainders, unlike legal remainders, are within the rule in *Cadell* v. *Palmer*. If, for example, land be granted to *A* for life, with remainder in fee to the first son of *A* who attains twenty-five, this is good as a legal remainder; for if there be no son aged twenty-five at *A's* death, the remainder will fail; the limitation, therefore, does not postpone the vesting of the fee one moment beyond the death of *A*. But if land be granted to trustees in trust for *A* during his life, and after his death in trust for the first of his sons who attains the age of twenty-five, the remainder is bad. For if *A* were to die leaving an eldest son one year old, the vesting of the equitable fee would be postponed for 24 years beyond the death of *A*. We have already seen that any limitation which may by possibility postpone the vesting of property beyond lives in being, and 21 years, is wholly void.

§ 3. *Executory Interests.*

We have seen that the common law would not permit a freehold estate to be limited *in futuro*, except by way of remainder. But this restriction does not apply to a conveyance to uses. By making such a conveyance, a settlor may give an estate which is to arise at a future time, without giving any 'particular estate' to precede and support it. Thus, he may grant unto and to the use of *A* and his heirs after 21 years. This is called a '*springing use*,' because it is to

spring up as a new estate and not to follow a preceding estate. If the settlor makes no express provision for the intervening term, there will be a '*resulting use*' for 21 years in favour of the settlor himself and his heirs.

Again, in a conveyance to uses, provision may be made for *shifting* the use (and, consequently, the 'lawful seisin') from one person to another on the happening of an event. For instance, a settlor may convey to the use of *A* and his heirs, but if *B* shall pay to *A* £1,000 then to the use of *B* and his heirs. In this case *A* has a fee simple, with all the rights of user and disposition which a fee simple includes; but his estate, and all estates derived out of it, may be destroyed at any moment on the happening of the event.

The same purposes which are effected by springing and shifting uses in a deed may be effected by means of executory devises in a will.

All executory limitations, whether in a deed or in a will, are within the rule in *Cadell* v. *Palmer*.

R. Finch devised land to trustees, directing them to pay the rents to his wife during her life, then, if H. Mayer should be living, to retain the rents to their own use during his life, and after his death to convey the fee simple to such son of W. Macdonald as should first attain the age of twenty-five. The Court of Appeal (reversing the decision of Malins V.C.) held that the limitation in favour of the son of W. M. was an executory limitation, and, as such, void. For W. M. might have had an eldest son one year old at the death of the survivor of Mrs. Finch and H. Mayer; and, if this had happened, the vesting of the fee would have been postponed during these two 'lives in being' and 24 years afterwards. *Abbiss* v. *Burney*, L. R. 17 Ch. D. 211.

To bring out the practical meaning of this somewhat abstract discussion, we may proceed to consider what is the actual position of persons entitled to the various estates and interests enumerated and described above.

§ 4. *Persons entitled in Possession, Reversion, etc.*

An estate in possession gives a present right to occupy the land, or to receive the profits thereof. Observe that an estate in possession does not of necessity imply possession of the land or immediate right to possess. For example, a person succeeding to the fee simple of land which has been leased to a farmer is an owner in possession, but he is bound by the covenant of his predecessor to leave the farmer in quiet enjoyment of the premises.

The rights of a person having an estate in possession will depend, of course, on the nature of the estate and on the extent to which it has been charged or burdened by the owner and his predecessors in title.

Possession has its liabilities as well as its rights. The freehold owner in possession is *primâ facie* liable for feudal services, for taxes, etc. imposed by public authorities, and for debts charged on the land. And if he is a limited owner he must exercise his rights with a due regard to the interests of those who are to come after him. The interests which a limited owner in possession is thus bound to consider—the persons with whom he may have accounts to settle—may be arranged under two heads.

1. Vested interests in expectancy. If *A* be tenant for life, the remainder or reversion in fee being vested in *B*, *A* must respect the rights of *B*. If he wrongfully impairs the value of the inheritance, as e. g. by committing unauthorised acts of waste, *B* may have an action against him for the damage done, or an injunction to restrain him from further intended wrong.

2. Contingent and executory interests. If land be given to *A* for life, with remainder to the right heir of *B* (a living person), the remainder is contingent and must remain contingent until the death of *B*. If *A* commits unauthorised

waste during the life of *B*, the eldest son of *B* could not maintain an action for damages; for it is not certain that the eldest son will be his father's heir. But if his remainder becomes vested he will have his action in respect of all unauthorised acts whereby the value of the inheritance may be impaired.

A contingent or executory interest is sufficient to entitle the person in whose favour it has been created to the protection of a Court of Equity. Thus, injunctions have been granted, on the application and for the benefit of contingent remainder-men and others, to restrain acts of waste.

All interests in land, vested in possession or expectancy, contingent, and executory, may be freely disposed of, by deed or will.

CHAPTER X.

TENURE OF ESTATES IN LAND.

In early times, persons holding land found it convenient to commend themselves to the protection of a lord. In return for his protection, they rendered him services; and these services were said to constitute the tenure on which their lands were held.

When the supremacy of the royal government was established throughout the country, the king was recognised as the lord paramount, to whom all persons looked for protection, and of whom all lands were directly or indirectly held. And inasmuch as all lands were held of the king, lawyers adopted the theory that the land had originally belonged to the king, and had been granted by him to those who owned it.

§ 1. *The Manor.*

In contemplation of law, then, the origin of estates in land was as follows:—The property in and jurisdiction over all the land in England belonged to the Crown. The king granted portions of the land to be the manors of subject lords. A lord would retain part of his manor as his own demesne (*dominicum*, lordship) to be occupied by himself, his servants, and his tenants-at-will, or to lie unoccupied as 'the lord's waste.' The tenants-at-will were dependent on the lord; and they attended as suitors, to receive justice from the Steward in the Customary Court of the manor.

Other parts of his manor the lord granted to free tenants, each of whom took some certain estate in the land, not less than an estate for his own life. Tenants of this class were not dependent; they were free owners or holders of land. The land given them became their own demesne, of which they were lawfully seised. They attended the Court Baron of the manor, not merely as suitors, but as members of the Court. And, inasmuch as they were freemen, they were protected, not only by the Court Baron and the custom of the manor, but by the King's Courts and the Common Law.

(It is unfortunate that we should have to use the same word 'tenants' to denote *owners* of land in relation to their feudal superior, and *occupiers* of land in relation to the owner who lets them the land or permits them to occupy it.)

The king himself, in right of his crown, was lord of many 'manors of ancient demesne'—that is, manors forming part of the ancient patrimony of the king, as distinguished from those which fell casually into his hands, by forfeiture and otherwise. The special customs of a manor of ancient demesne remained in force, even when the manor was granted to a subject.

§ 2. *Legislation affecting Tenure.*

In feudal times, considerable freedom was permitted in the creation of new tenures and sub-tenures. An owner, holding under a lord, but seised in his own demesne, might grant portions of his land to be held by free tenants under himself; and this practice was called subinfeudation. When such a grant was made, the lord of the grantor found that his rights were affected thereby. He did not lose the services of his tenant, because the law permitted him to distrain on the land itself if the services were withheld. But he might lose casual rights of considerable value—'escheats, marriages, and wardships.'

If, for example, the tenant died, leaving an infant heir, the lord had the right of wardship. But if the tenant admitted a sub-tenant and then disappeared, the lord would have no means of knowing when the benefit of wardship arose. Or if the sub-tenant had been admitted to hold by some nominal service, the interest of the original tenant became valueless; and the wardship of his heir was worth nothing. It was the wardship of a person entitled to a merely nominal interest in the land.

The practice of subinfeudation was checked by the statute *Quia Emptores*, 18 Ed. I. The statute recognises the right of free tenants to enfeoff others in their land, but it provides that a feoffee in fee simple is to hold, not of the feoffor, but of the feoffor's lord by the same service as the feoffor held before. The effect of the statute is, that no person can now grant the fee simple of land to be held under himself.

The services by which land was held in feudal times were various. Some were of a military nature, as in the case of tenure by knight-service; but these military services were abolished at the Restoration by the 12 Car. II. c. 24. Other tenures again were of a servile character, as e. g. tenure in villeinage. Some incidents of these servile tenures may still survive; but no person now has the status of a villein.

The tenures by which land is now actually held in England are of three kinds.

§ 3. *Spiritual Tenures.*

Some lands are held by the tenure known as frankalmoign or free alms. When the lord of a manor gave land in free alms to a spiritual person, as e. g. to a parish priest and his successors, the services by which the land was held were the duties belonging to the sacred office of the tenant. There was no specific service which the lord could distrain or compel the tenant to perform. Frankalmoign was expressly excepted

out of the Act of 12 Car. II, which abolished the old military tenures.

Another form of spiritual tenure was created when land was given as an endowment to provide for the performance of some particular rite—as e. g. annual masses for the soul of the donor. This was called tenure by divine service. It differed from frankalmoign because the tenant owed a specific duty to his lord, which he might be compelled to perform. But since the Reformation, when masses and prayers for the dead were discontinued, this tenure differs little, if at all, from tenure in frankalmoign.

§ 4. *Lay Tenure, Free.*

There is now only one form of lay free tenure. The Act 12 Car. II. c. 24 directs that 'all estates of inheritance at the common law' shall be held by the tenure known as free and common socage. There is a saving for the *honorary* services of the military tenures known as grand and petit serjeanty; but with that exception no service is done for any lay freehold except the services of a socage tenant.

These services are, 1. An oath of fealty or fidelity to the lord (now never exacted). 2. Suit of Court—i. e. attendance in the Court Baron of the manor. But there are many places where manorial courts have long ceased to be held. 3. Payment of money dues for which the other services of this tenure were long ago commuted. In many places these dues are no longer paid; but there are still freehold owners who pay dues for their land, such as quitrents, fines on alienation, and heriots (i. e. tribute paid to the lord on the death of a tenant).

There is no necessary connexion between the tenure and the quantity of the tenant's interest in the land. But, as we have seen, the free tenant of early times usually took a certain

estate in the land not less than on estate for his own life. A person taking the land for a term—say a term of five or ten years—did not become freehold owner. Even when long terms came into use, the distinction between the mere termor and the freeholder was still observed by lawyers. At the present day, a person who holds land for 999 years is not a freeholder; and he is said to have a less estate in the land than a tenant for life.

At the present day, when we say that a man is a freeholder, we mean that his land is held in free and common socage; and that he has in the land either an estate of inheritance or an estate for life or lives.

Modern cases illustrating the nature of free tenure have usually arisen out of claims to the casual profits of lordship, such as heriots, etc.: see, for instance, *Damerell* v. *Protheroe*, 10 Q. B. 20. Damerell, lord of the manor of South Tawton, claimed a heriot on the death of a freehold tenant of the manor, and brought an action against the tenant's executors. To prove his right to a *heriot-service* might have been difficult, because such a right must have originated before *Quia Emptores*: since that statute no free tenure can be created or heriot-service reserved. The lord therefore claimed a *heriot-custom*—that is a tribute from the tenant, due by the custom of the manor, whether it formed part of the original tenure or not. It was contended 'that no heriot could be due by custom in respect of a freehold,' but the Court declared the objection to be without foundation.

The casual profits mentioned in *Quia Emptores* are 'escheats, marriages and wardships.' The lord has now no right to take the wardship of an infant tenant, or to dispose of him in marriage; but escheat is still known to the law. If a freeholder dies intestate, leaving no heir, the land returns, by reason of tenure, to the lord by whom, or by whose predecessors in title, the tenure was created. If there be no subject lord who can make out his claim, the escheat is to the Crown.

Freehold lands are usually held subject only to the general law of the land; but they may, as we have seen, be subject also to local customs. *Burgage* tenements, for example, are lands and houses in certain ancient boroughs, which are held in socage, subject to the customs of the borough as to descent, dower, etc. *Gavelkind* lands are lands in the county of Kent, which are held in socage, subject to the custom of that county as to descent, dower, etc. It seems also that the freeholders in manors of ancient demesne are subject to special customs: see R. P. Commissioners 3rd Report, 13.

§ 5. *Lay Tenure, Base or Customary.*

It was stated above that the persons who occupied the demesne of the lord of a manor were dependent on his will. The freehold of their land remained in the lord; they had no estate or interest recognised by the common law. But they were protected by the custom of the manor; and the custom was strong enough to prevent the lord from turning out a tenant who performed his customary service. When a customary holding changed hands, the admittance of the new tenant was entered on the roll of the Customary Court, and the tenant received a 'copy of Court roll' as evidence of his right. Finally the King's Courts recognised the copyholder, and extended their protection to him; his rights then became almost as secure as those of a freeholder.

There are two forms in which customary tenure still survives.

1. Copyhold. A copyholder is an owner of land, holding by copy of court roll, at the will of his lord, according to the custom of the manor. The words 'at the will of the lord' have now little or no meaning; they are, as we have seen, controlled by the words which precede and follow them.

The services of a copyholder are, an oath of fealty, now

always 'respited' or dispensed with: suit of Court, i. e. attendance in the Customary Court of the manor, a service still incumbent on copyholders generally: and payment of dues.

The dues exacted from copyholders include quitrents, usually of small amount; fines paid on the admittance of a new tenant, when the holding changes hands; and in many places heriots are also claimed, by virtue of the custom of the manor or of a reservation in the original grant. The heriot usually consists of 'the best beast on the holding,' and it is claimed on the death of a tenant. This tribute is probably a relic of the time when the lord supplied his tenant with horse and arms, reserving his right to take back the gift on the death of the donee.

As in the case of the freeholder, we may remark that there is no necessary connexion between the tenure of a copyholder and the extent of his rights over the land. But inasmuch as copyhold is taken to have been developed out of a mere tenancy at will, the rights of a copyholder are usually more or less restricted. He has, as a general rule, no right to open mines or to cut timber. He may not make a lease of his tenement for more than a year, unless he is authorised to do so by the license of his lord, or by a special custom of the manor.

2. Privileged copyhold—commonly, but not correctly, called customary freehold. A privileged copyholder holds by copy of court roll, according to the custom of the manor, but not at the will of his lord. His services and his rights are now the same as those of an ordinary copyholder. This kind of tenure is found chiefly in manors of ancient demesne.

In the last century, privileged copyholders claimed to vote as freeholders in county elections. Blackstone published his reasons for thinking that they were not freeholders: see his Law Tracts, vol. i. Parliament was guided by Blackstone's

opinion, and the Act 31 Geo. II. c. 14 confirmed the exclusion of this class of owners from the franchise. The parliamentary franchise was extended to all copyholders whose tenements are of a certain value by the Reform Acts of 1832 and 1867.

The comparatively recent case, *Duke of Portland* v. *Hill*, L. R. 2 Eq. 765, turned on the distinction between freehold and 'customary freehold' land. Hill was the owner of land in the manor of Bolsover, held of the Duke of Portland by copy of court roll, according to the custom of the manor, but not at the will of the lord. He claimed the right to dig for coal in his land, and to sell the coal if he thought fit. Page Wood, V. C., held that the freehold of the land in question was in the lord, and that the tenant, being only a privileged copyholder, had no right to dig for coal, unless authorised by special custom. The tenant failed to prove the existence of such a custom, and an injunction was granted to restrain him from digging for coal under his copyhold.

§ 6. *Creation and Extinction of Tenure at the present day.*

Since the statute *Quia Emptores*, no new free tenure, spiritual or lay, can be created, except by the Crown.

New copyhold tenures are still occasionally created. If such a tenure is extinguished by reason of the tenement having come into the hands of the lord, the tenure may be revived by a fresh grant of the land to be held by copy of court roll. There are also manors where the custom permits the lord to grant portions of the waste to be so held: by such a grant an entirely new copyhold tenure is created. The custom usually requires the lord to obtain the consent of the 'homagers' or customary tenants.

The Dean and Chapter of Winchester, lords of the manor of Crondall, granted to Arlett a part of the waste to be held by copy of court roll, etc. The grant was made without consent of the homagers, and was therefore invalid: the grant was 'presented' as an encroachment at the annual Customary Court. Shefford, a

tenant having the right of pasture over the waste, broke down Arlett's fences and drove in his own cattle. Arlett brought an action of trespass; but he was nonsuited. The grant being proved invalid, he had no property in the land, and therefore no cause of action. *Arlett* v. *Ellis, Shefford, and others*, 9 B. & C. 671.

Freehold land, if owned by a subject, is always held of the Crown or of a subject lord, and there is no mode of extinguishing the tenure.

Copyhold land cannot be altogether freed from tenure, but the tenure may be changed to freehold. If the lord, for example, acquires the copyhold, the rights of the copyholder are merged in the freehold. In like manner, if the copyholder acquires a freehold interest in the land, his customary estate comes to an end. If a copyholder marries the lady of the manor, his tenure is said to be suspended while his estate in right of his wife continues; it seems doubtful how far this rule may have been affected by the provisions of the Married Women's Property Act.

Copyhold tenure is also extinguished by enfranchisement, when the lord conveys the freehold to the tenant, and releases him from his services. When this is done, the land is thenceforth held in socage, not of the lord (which would be contrary to *Quia Emptores*), but of the superior lord or of the Crown, as the lord himself held it before. Enfranchisement deprives the lord of his fines, etc., and the steward of the manor of his fees; the assessment of compensation for these extinguished rights is made according to well understood rules of valuation.

For some time past Parliament has regarded copyhold tenure as an obstacle to 'free trade in land.' Facilities for enfranchisement have been provided by Acts passed in 1841, 1852, 1858, and 1887. Any copyhold tenant may now compel his lord to enfranchise; and the lord may compel his tenant to accept enfranchisement. Under the Copyhold Act,

1858, compensation for manorial rights may be fixed by agreement or by valuation. On the basis of the agreement or valuation the Copyhold Commissioners (now the Land Commissioners for England) are to make an award and may confirm the same; and the confirmed award has the effect of a deed of enfranchisement.

CHAPTER XI.

INTERESTS IN PERSONAL PROPERTY.

A STOCK of goods or a sum of money has not a permanent, unmistakeable identity, like a piece of land. When personal property passes out of the possession of its owner, it is difficult to trace and sometimes impossible to recover. We moderns have learned to think of invested capital as a permanent thing; but at the time when our law was taking shape investment was little understood; money and goods were regarded as property to be spent and distributed. If a common lawyer had been asked to consider the effect of a bequest of £1,000 to *A* for life with remainder to *B*, he might have said: 'This is simply a gift to *A*; and he may spend it all himself. How can there be a remainder in anything so perishable as money?'

It is only by introducing equitable notions that a settlement, creating successive interests in personal property, becomes possible. In the case just given, a court of equity would say: 'The obvious intention of the testator is that *A* should have the income of this money, and *B* the capital after *A's* death. We shall give effect to that intention by treating *A* as trustee of the capital for *B*.'

A settlement of personal property may be made in two ways. The settlor may transfer the legal ownership to trustees, using for this purpose the forms already described (*ante*, p. 55). Or he may do what is necessary to divest

himself of his beneficial ownership and to declare himself a trustee. When the trust has been created, the trustee or trustees will be responsible for the investment and management of the property, and they must perform their duties with due regard to the interests of the persons successively entitled to the income and capital. These interests, whether vested, contingent, or executory, may be alienated by the persons in whose favour they are created, subject to the general rules which we have summarised in Chapters I–VII.

§ 1. *Investments.*

The duties of a trustee in relation to the trust property have been generally described in Chapter II. It may be useful to add a few words on the important question of investments.

In making investments, or in retaining investments made by the settlor, a trustee must be guided by the instrument creating the trust. He is, generally speaking, safe in following the directions of the testator or settlor; but if he is directed to make an investment which is obviously unwise (as e. g. to purchase land in Ireland) he may take the opinion of the Court, and obtain permission to make some safer use of the funds entrusted to him.

The powers of investment given by wills and settlements have been extended by a series of statutes and rules of court, the most important of which are the following:—

Trustees may lend money on real securities (i. e. on mortgages of land) in any part of the United Kingdom: 22 & 23 Vict. c. 35. The term 'real security' includes charges under the Improvement of Land Act, 1864. It also includes (since the Trustee Act, 1888) a mortgage of leasehold, if held for an unexpired term of 200 years, not subject to any rent greater than one shilling, or to any right of redemption, or to any condition for re-entry (except for non-payment of rent).

In advancing money on real security, a trustee is bound to see that the value of the land is such as to afford ample security for the loan, and that the title is made out by satisfactory evidence. The Act last cited empowers a trustee to employ a competent surveyor or valuer, and to act on his advice, as expressed in his report; but the amount of the loan is not to exceed two-thirds of the value of the property, as stated in the report. The Act also empowers a trustee to accept a title shorter than a purchaser would (in the absence of a special contract) be entitled to require; but the title must be such as a person acting with prudence and caution would accept. In advancing money on leasehold, a trustee may dispense with investigation of the lessor's title.

Trustees are empowered to invest in stock of the Bank of England or the Bank of Ireland, and in East India stock: 22 & 23 Vict. c. 35; also in any securities the interest of which is guaranteed by Parliament. Powers to invest in government securities, etc., extend to all investments included in any general order as to the investment of cash under the control of the Court: 23 & 24 Vict. c. 38. The general order now in force is Order XXII. rule 17 of the Rules of the Supreme Court. It contains a long list of stocks and other investments which are considered suitable to be held by trustees.

In applying the rules by which powers of investment have been extended, two points must be carefully borne in mind. In the first place, the rules do not authorise any investment which is expressly forbidden by the instrument of trust. In the second place, they do not absolve a trustee from the duty of exercising his discretion in the management of the property. He must consider, not only whether a proposed investment is permitted by law, but also whether it is a safe and wise investment for him to make.

CHAPTER XII.

WILLS.

If an owner of property wishes to determine its destination after his own death, he may do so in two ways: first, he may make a settlement, and in this case his arrangements are, generally speaking, irrevocable, unless he reserves to himself, or to some other person, the power to revoke them.

In the second place, he may make a will; he may, to use the technical words, *devise* his land, and *bequeath* his personal property. In this case, his arrangements are revocable. He may at any moment revoke his will.

§ 1. *The Form of a Will.*

The Wills Act, 1837, lays down the following rules as to the form in which a will must be made:—

No will is valid unless it be in writing (which, of course, includes print).

No will is valid unless it is signed at the foot or end by the testator, or by some other person in his presence and by his direction. By the 15 & 16 Vict. c. 24, it is further provided that the signature may be placed at, after, following, under, beside, or opposite to the end of the will; it need not follow immediately at the end; it may even be placed in the testatum clause, or on a page whereon no clause of the will is written above it. But no signature gives effect

to any disposition or direction underneath or following it, or inserted after it is made.

No will is valid unless the signature of the testator is made or acknowledged in the presence of two or more witnesses, present at the same time. The witnesses must attest and subscribe the will, in presence of the testator. The credibility of a witness may be affected by his having an interest in the establishment of the will; it is therefore enacted that if any person attests a will to whom, or to whose wife or husband, any gift (except charges and directions for payment of debts) is thereby made, such gift shall be void. But a creditor, or the wife or husband of a creditor, may attest a will whereby real or personal estate is charged with debts. An executor is competent to be a witness.

No alteration made in a will after execution is valid (except so far as the words or effect of the will before alteration shall not be apparent) unless it is executed with the forms required for the execution of a will. The testator and two witnesses must place their signatures opposite or near the alteration, or at the end of or opposite to a memorandum referring to the alteration, written at the end or on some other part of the will.

A codicil is a separate document whereby a testator makes some addition to or alteration in a previously executed will. It must be executed with the forms required for the execution of a will. It is in fact a will. Let us suppose that *A* makes a will on Monday; on the following day he executes a codicil, giving a legacy of £10 to *B*, and in all points confirming his will. The 'last will of *A*' is the codicil of Tuesday, confirming and incorporating the testamentary document of Monday.

The question whether the foregoing rules have been duly complied with is not infrequently raised in the Probate Division of the High Court of Justice.

In *Margary* v. *Robinson*, L. R. 12 P. D. 8, a will was propounded which was written on a card, signed by the testator with a mark, and initialed on the back by two witnesses. This extremely informal document would have been admitted to probate as a will, if the testator's mark had been placed at the foot or end of the card. A facsimile of the card is given in the report.

Probate may be refused on the ground that the document propounded has not been properly executed. It may also be refused on the ground that the document was executed under undue influence, and therefore does not express the will of the testator. If a testator, though influenced by foolish or immoral motives, really intends to give his property to another, the will must stand. But if the testator is coerced into making a gift which he does not desire to make, that is undue influence.

Again, probate may be refused on the ground that the testator was not of sound mind. If the validity of a will is questioned, the person propounding it must show that the testator was capable of understanding the facts relating to his property, and to the persons having claims upon him, and of making his testamentary dispositions accordingly. (See the remarks of Sir J. Hannen in *Smee* v. *Smee*, L. R. 5 P. D. 84—a curious case which arose on the will of a gentleman who imagined himself to be a son of George IV.)

The requisites to the validity of a will, therefore, are two. It must express the intentions of a person competent to dispose of property, and free to dispose of it as he will; and it must be executed with the forms required by law.

§ 2. *Executors.*

The executor is the person to whom the performance of the will of another is committed. It is usual to name executors in making a will; if there be a will in which none are named, or if, for any reason, those who are named cannot act, ap-

plication is made for letters of administration as in a case of intestacy (see post p. 123), and administration is granted *cum testamento annexo.*

An executor may renounce the office conferred on him, provided he does so before acting. Renunciation must be made by writing under his hand. He is permitted to retract his renunciation at any time before it is filed in the registry of the Probate Division. Even after filing, it is said that a renunciation may be retracted at any time before a grant of administration to another or others shall have passed the seal of the Court.

If one of several acting executors dies, the survivors continue to exercise the office. If a sole or last surviving executor dies, his office passes to the executor of his own will. If he dies intestate, it does not pass to his heir or his next of kin; for the relation between testator and executor is one of personal confidence.

The first duty of an executor is to provide for the decent burial of the testator; his next duty is to prove the will. This is done by depositing it in the principal registry of the Probate Division (at Somerset House) or in the registry of the district in which the testator resided at the time of his death. Affidavits are lodged verifying the death, and the amount of personal property left by the deceased; and probate duty is paid by means of stamps on the affidavit verifying the amount of the estate. This is all that is necessary to the proof of a will in common form; but if there is a dispute as to the authenticity of the will, probate is withheld until it has been proved 'in solemn form' by witnesses in Court. After proof in common or in solemn form, the executor receives a parchment copy of the will, together with a grant of administration; and this grant constitutes his formal authority to collect and distribute the personal property of the deceased. But his rights are derived from the will, and the property vests in

him at the death of the testator. His powers and duties in relation to the personal estate may be summarised as follows.

In the first place the executor has to 'get in' the estate. He has to take possession of corporeal chattels, money, and securities for money belonging to the testator; he must, if necessary, sue for and recover choses in action. He may sue on contracts and personal covenants made with the testator; he may also sue in respect of wrongs done to him or his property (real or personal), but only in so far as they have caused injury to the personal estate. Statutory power has been given him to sue or distrain for arrears of rent; and the Act 9 & 10 Vict. c. 93 enables him to bring an action, for the benefit of near relatives, against any person whose act or default was the cause of the testator's death.

An executor has also the powers necessary for converting the testator's property into money. He may, for example, sell chattels of the deceased, and can make a good title to the purchaser, or he may realise and dispose of securities held by the deceased. Where the due performance of the will requires it, he may invest the money which comes to his hands. An executor is in a fiduciary position; his investing powers therefore are similar to those of a trustee as described in Chapter XI. After his duties as executor are over—after debts have been paid, and the value of the estate has been ascertained—his executorial character merges into that of trustee of the funds invested in his name.

When several executors prove the will, each of them is competent to exercise the powers of his office in respect of the whole estate. In legal proceedings and in formal instruments, it is usual and convenient that all the executors should be made parties. Each executor is responsible for the administration of the whole estate; and he may be made liable for the default of his co-executor, if such default was rendered possible by his own negligence or passive acquiescence.

§ 3. *Devisees.*

There is an important difference in point of effect between a bequest and a devise. Personalty given by will must be collected and distributed by the executor, and the legatee receives his legacy from the executor. Land given by will passes at once to the devisee. In a will which disposes of land *only*, it is not necessary to name an executor; nor is it necessary that any person should apply for probate.

There is, then, on the death of a person who owns real and personal property, no 'universal successor.' Land disposed of by will goes to the devisee; personalty disposed of by will to the executor; land not disposed of to the heir; personalty not disposed of to the executor or administrator for distribution among the next of kin.

All the property of a deceased person, whether in possession of the executor or administrator, heir or devisee, is assets for the payment of his debts; and the claims of creditors must of course be preferred to the claims of legatees, devisees, and persons succeeding to the property of an intestate. We shall consider in a subsequent chapter the rules which executors and others must follow in paying the debts of a deceased person.

§ 4. *Legacies.*

After paying the debts of his testator, the next duty of an executor is to pay legacies. In relation to the executor, a legatee is not in the position of a creditor. Until the executor assents to the legacy, no action *at law* lies to recover it from him; and even after he assents to it, the rights of the legatee remain subject to such orders as a court of equity may make, with a view to the interests of all parties benefiting by the will. In adjusting the claims of legatees, we must observe the distinction between a *specific* bequest, i. e. a bequest of a specific thing, forming a distinct part of the testator's property, and a *general* bequest, as e. g. a bequest of a sum of

money to be paid or a gift to be provided out of the testator's general personal estate. The following cases will illustrate the importance of this distinction.

A bequeaths to *B* 'my horse Bucephalus,' or 'my stock in the Midland Railway Company.' Here *B* is entitled to claim the specific thing bequeathed to him. If the testator has charged the specific property, as e.g. by pledging his Midland Railway stock to his banker for an advance of money, *B* may require the executor to pay off the charge, or to compensate him out of the general personal estate. If the general personal estate is sufficient for the payment of debts, *B* is not liable to contribute. These are the advantages of a specific legatee; his disadvantage lies in the fact that his legacy is liable to ademption; it is taken away if the specific thing bequeathed to him ceases to be the property of the testator. If, in the case given, *A*, after making his will, should sell his horse Bucephalus or his Midland Railway stock, *B* will take nothing by the bequest.

A bequeaths to *B* '£1,000 out of my Bank of England stock.' The legacy here is not *specific* but *demonstrative*; it is general in its nature, but the testator indicates a distinct fund out of which it is to be paid. If the fund forms part of the testator's property at his death; and if all debts can be paid out of the general personal estate, without having recourse to the fund, *B* will take his legacy without deduction. But if the fund ceases to be the testator's property, *B*'s legacy is not taken away; he will still have a claim for £1,000 against the general personal estate.

A bequeaths to *B* 'the sum of £1,000, and a gold watch.' Both these legacies are general in their nature. *B* may require the executor to pay him £1,000 and to purchase for him a gold watch; these claims are to be satisfied out of the general estate, after payment of debts and after setting aside such parts of the estate as may have been specifically bequeathed.

A, by his will, gives legacies to various persons, and bequeaths 'all the residue of my personal property' to *B*. The legacy is general in its nature; *B* takes the personal estate, after payment of debts and of specific and general legacies. There is a difference, in point of effect, between a residuary bequest and a residuary devise. For, in bequeathing the residue of his personalty, a testator must be taken to know that his general personal estate is the fund out of which debts, legacies, etc. will have to be paid; his residuary bequest is therefore uncertain in point of value. But if *A*, owner of Blackacre and Dale, devises Blackacre to *B* and the residue of his real estate to *C*, he probably does not anticipate that his real estate will have to be made available for payment of debts and legacies: his will may therefore be construed as if he had made a specific devise of Dale to *C*.

All property devised or bequeathed is liable to duty under the Legacy Duty Acts or under the Succession Duty Act of 1853. In the case of legacies, the executor pays duty on the total value of the legacy, and deducts the amount on paying the legatee (unless the legacy is given free of duty). In the case of land, the devisee pays the duty; his interest in the land being valued as if it were an annuity equal to the annual value of the property, and the duty being paid in eight half-yearly instalments. There is therefore a considerable inequality in the mode of levying the duty on real and personal property respectively.

§ 5. *Construction of a Will.*

A will is construed less strictly than a deed. The expressed intentions of the testator are to be carried out, if possible, even if they are not expressed with technical accuracy. The special rules of construction contained in the Wills Act 1837 are founded on this general principle. The chief rules of the Act may be summarised as follows:—

A will, with reference to the property comprised in it, is to speak and take effect as if it had been executed immediately before the death of the testator. Thus, a bequest of 'all my leasehold property' will include leaseholds acquired by the testator after making his will.

If the person to whom property is given by will dies in the testator's lifetime, the gift lapses; but to this rule the Act makes several exceptions. A devise of an estate tail does not lapse if, at the testator's death, there be issue of the donee living and capable of inheriting. And a gift of property to a child or other descendant of the testator does not lapse, if, at the testator's death, there be issue of the donee living.

A residuary devise includes, not only land undisposed of, but land comprised in a devise which has failed to take effect. A general devise of 'land' includes copyholds and leaseholds. A general gift of property includes property over which the testator had a general power of appointment.

A devise without words of limitation passes the fee simple or other the whole interest which the testator had power to dispose of by will. A devise to a trustee without words of limitation will vest the fee simple or other the whole legal interest of the testator in the trustee (1) if the beneficial interest is not given to any person for life, (2) if the beneficial interest is given to a person for life, but the purposes of the trust may continue beyond the life of such person. Where, for example, land is devised, without words of limitation, in trust for payment of debts, and in trust to pay the rents to *J. S.* for his life, etc., the trustees take a legal estate in fee, because they may have to hold the land after the death of *J. S.*

To all these special rules of construction must be added the qualifying words, 'unless a contrary intention shall appear by the will.'

CHAPTER XIII.

INTESTATE SUCCESSION.

If an owner of property dies without making a will, the law points out the persons who succeed to his rights. In this connexion, we must deal separately with real and personal property.

The rules which govern the descent of real property are the rules of common law, as amended by the Inheritance Act, 3 & 4 Will. IV, c. 106. They may be summarised as follows:—

The heir of a deceased person is ascertained at the time of death. Nemo est heres viventis. The Prince of Wales is not the Queen's heir, because it is not certain that he will survive her Majesty. He is 'heir apparent' because, if he survives, he will certainly be the heir. Again, the next brother of any unmarried peer is not heir to the peerage. He may be 'heir presumptive,' because, if he survives, and if no child is born to his brother, he will inherit the peerage, if he is within the words of limitation contained in the original grant.

The heir is to be sought among persons related by legitimate consanguinity to the deceased. And, as land is always subject to the *lex loci*, 'legitimate' means legitimate according to the law of England. For example, the son of a domiciled Scotsman, born illegitimate and legitimized by the subsequent marriage of his parents, according to Scots Law, does not succeed to his father's real property in England.

In tracing descent, males are preferred to females in the same degree. Of males in the same degree, the eldest is sole heir, to the exclusion of the rest. Females in the same degree take as co-heiresses or co-parceners. Their position is analogous to that of joint-owners, but there is no benefit of survivorship between them.

If any person in the order of succession is dead, his descendants are entitled to represent him.

Bearing in mind the foregoing rules of common law, we trace the descent, according to the Inheritance Act, as follows :—

Descent is traced from the last purchaser, that is from the last person who acquired the property otherwise than by descent.

We look for an heir first among the children and other descendants of the purchaser. If there be no descendant, we take next the father of the purchaser or (if he be dead) his descendants; then the paternal grandfather and his descendants; and so on, in the ascending line. If no heir has yet been found, we proceed to female ancestors in the paternal line: the mother of a more remote paternal ancestor and her descendants being preferred to the mother of a less remote ancestor and her descendants. If the ascending paternal line is exhausted without finding an heir, we proceed to the mother of the purchaser or (if she be dead) her descendants; then to the mother's father and his descendants, and so on. If we go through all discoverable male maternal ancestors and their descendants without finding an heir, we take next female ancestors in the maternal line, the mother of a more remote male maternal ancestor and her descendants being preferred to the mother of a less remote and her descendants.

In following out these lines, we take a kinsman of the half-blood next after kinsmen of the whole blood in the same degree, if the common ancestor is a male; next after the

common ancestor, if such ancestor is a female. For example, the eldest half-brother by the father's side comes next after the brothers and sisters of the whole blood: the eldest half-brother by the mother's side comes next after the mother.

It might have been supposed that these rules were sufficiently elaborate to prevent any chance of a failure of heirs; but the case of *Doe* d. *Blackburn* v. *Blackburn*, 1 Mood. & Rob. 547, revealed a defect in the Inheritance Act. G. Newbald, a foundling, purchased land; he married a widow, M. Jackson, whose maiden name was Blackburn. The land descended to his son, G. N. the younger, who died unmarried and intestate in 1834. W. Blackburn entered into possession; J. Blackburn took proceedings against him, claiming to be the eldest grandson of J. Blackburn, eldest brother of Mrs. Newbald. The plaintiff was nonsuited, Parke B. being of opinion that neither W. B. nor J. B. was entitled by descent, neither of them being of the blood of the 'last purchaser,' G. Newbald the elder.

To remedy the defect in the law disclosed in this case, it was enacted by the 22 & 23 Vict. c. 35, that if there should be a total failure of heirs of the purchaser, descent should be traced from the person last entitled, as if he had been the purchaser.

If there is no heir of the purchaser, and no heir of the person last entitled, the land is escheated, by reason of tenure, to the feudal superior of whom it is held. At the present day freehold land is seldom held of a mesne lord, and escheat, as a general rule, is to the Crown. When escheated land is claimed by the Crown, the Queen's title must be found by a jury in case of dispute. If they find for the Crown, the Queen may exercise her prerogative of grace and bounty; and this is sometimes done when there are persons who have a moral claim to a provision out of the property of the deceased. So far as the prerogative is not exercised, the escheated lands fall into and become part of the Crown Lands, which are

under the management of the Commissioners of Woods and Forests.

§ 1. *Special Rules of Descent.*

It is to be observed that the foregoing rules apply, in their integrity, only to the descent of a fee simple. The descent of a fee tail takes place, in accordance with the statute, *per formam doni*, to heirs of the body, heirs male of the body, etc., according to the terms of the gift.

Gavelkind lands descend according to the custom of Kent, which directs equal partition among the sons; *burgage* lands according to the custom of the borough in which they are situated; *copyhold* lands, and freeholds in manors of ancient demesne, descend according to the custom of the manor.

§ 2. *The Heir at Law.*

The heir is the 'real representative' of his ancestor in respect of real property not disposed of by will, and he may enter at once into possession of the estate which has descended to him. His rights and liabilities may be briefly stated as follows:—

The heir is entitled to take all real estate of his ancestor not disposed of by will. He pays succession duty; the value of his interest is calculated as if it were an annuity, and the duty is payable in eight half-yearly instalments; it is made a first charge on the land, as in the case of a devisee.

The heir of a covenantee is entitled to the benefit of covenants made with his ancestor, so far as they relate to land of inheritance, or to an estate *pur autre vie* devolving on him as special occupant. This rule is confirmed by s. 58 of the Conveyancing Act, 1881.

The heir of a covenantor is liable to an action on the covenants and engagements under seal of his ancestor, in so far as they bind his real estate. Before the Conveyancing Act, 1881, it was necessary to make express mention of heirs

in order to bind the real estate; but s. 59 of the Act provides that in covenants, etc. made on or since the 1st January, 1882, the real estate shall be bound, unless a contrary intention is expressed.

In an action for the administration of his ancestor's property, the heir may be liable to the claims of all creditors, whether by specialty (engagement under seal) or simple contract. For the 3 & 4 Will. IV, c. 104 enacts that all the real estate of a deceased person which he shall not have charged with or devised subject to payment of his debts shall be assets in equity for the payment of all debts. (The Act preserved the priority then enjoyed by specialty creditors, but this priority was taken away by the 32 & 33 Vict. c. 46.)

§ 3. *Intestate Succession to Personalty.*

When a person dies intestate there is, of course, no executor to look after his personal property. It becomes necessary that some person should apply to the Probate Division of the High Court for letters of administration, authorising him to collect and distribute the personal property of the deceased. In granting administration the court is directed by statute to give a preference to the widow and nearest of kin, and a widower has a paramount claim to administer the personal estate of his deceased wife. But the grant is always discretionary in its nature, and the Court may for special reasons refuse administration even to the widow or undoubted nearest of kin. If a person dies intestate, leaving no widow or kin, administration may be granted to a nominee of the Crown. Failing any other representative, administration may be granted to a creditor of the deceased.

If a testator names no executor, or if the executor named refuses to act, application may be made for administration *cum testamento annexo*.

The application for letters of administration is supported by

affidavits; and the affidavit verifying the amount of the personal estate must be stamped to the amount of the duty payable, the duty being the same as that which is paid by an executor on applying for probate.

The authority of an administrator is derived from the Court, and the personal property of the intestate vests in him from the date of the grant. On his appointment he becomes the personal representative of the intestate. His powers and duties are, generally speaking, the same as those of an executor. He has to get in the estate, to keep accounts of the property coming to his hands, to pay the debts of the deceased, and to distribute the residue among the next of kin.

§ 4. *Distribution of Residue.*

Claims to personal property, not disposed of by will, are founded either on marriage or on legitimate consanguinity.

Marriage.—A widower is, as we have seen, entitled to take the administration of his deceased wife's estate. He is also entitled to claim for himself all personal property of which she has not disposed.

If a married man dies intestate, his widow takes one-third of his personalty if there are children or other descendants, one-half if there are none. In no case is she entitled to more than one-half. Her rights may be barred by an ante-nuptial settlement.

Legitimate consanguinity.—Here the term 'legitimate' is less strictly construed than in the case of real property. If, for example, a child is rendered legitimate *per subsequens matrimonium*, according to the law of a foreign country, he is admitted to share in the distribution of personalty if his parent dies intestate, domiciled in England. He is legitimate by personal status, though not legitimate according to the *lex loci*.

Males are not preferred to females in the succession to

personalty; the rule of primogeniture does not apply; and relations of the half blood rank along with relations of the whole blood in the same degree. Degrees are counted up to the common ancestor and down again; thus, a brother is in the second degree.

Kinsmen equal in degree share equally *per capita*. Kinsmen nearer in degree exclude those who are more remote: if, for example, the only known kin of the intestate are two uncles, one living and one dead, the living uncle takes the personal estate; children of the dead uncle are excluded, because they are one degree further off from the intestate.

To this rule of exclusion exceptions are made in the case of descendants and of brothers' or sisters' children. If a distribution falls to be made among living children or grandchildren, or among brothers and sisters, the children of a deceased child, grandchild, brother, or sister are admitted to represent their parent, and take his or her share *per stirpes*, sharing it equally *per capita* among themselves. Nephews and nieces are also permitted to share (in their own right) along with grandparents, although they are one degree further off from the deceased.

Bearing in mind these general rules, we deduce the succession to personalty in accordance with the Statutes of Distribution (22 & 23 Car. II. c. 10, and 1 Jac. II. c. 17) as follows. If there is a widow we set aside her one-third or one-half, as the case may be; and, subject to her claim, we distribute the estate among the nearest of kin.

If there are children living the estate goes to them; children of a deceased child representing their parent.

If any child has an estate settled on him, or a portion advanced to him, by the father in his lifetime, such child has no claim to share in the distribution, except so far as may be necessary in order to make his share of the father's property equal to the shares of the other children. This rule does not

apply in the case of children succeeding to their mother. The heir-at-law is entitled to claim his share of the personalty, without taking account of the land which he has acquired by descent or otherwise.

If there are no children living, grandchildren and children of a deceased grandchild, as representing their parent, are next in degree. As between descendants, the distribution is *per stirpes*, each family of grandchildren taking the share of the child whom they represent. (In re *Natt*, L. R. 37 Ch. D. 517.)

If there are no descendants, the father, if living, takes the whole. If there is no father, the mother, brothers, and sisters share equally; children of a deceased brother or sister representing their parent.

If no descendant, parent, brother, or sister is living, grandparents, and nephews and nieces (taking in their own right) are next in degree. If no grandparents are living, nephews and nieces share with uncles, aunts, and great-grandparents if living.

If it becomes necessary to carry the inquiry beyond this point, we proceed to relatives in the fourth, fifth, and more distant degrees, applying mechanically the rule that the nearer degree excludes the more remote, and the rule that kinsmen in the same degree share equally.

If there be no discernible next of kin, the personal estate of an intestate (subject to the claim of the surviving husband or wife, if any) falls to the Crown as *bona vacantia*. The right of the Crown is founded on general public policy, and not on tenure; for personal property, as we have seen, is not a subject of tenure.

CHAPTER XIV.

DEBTOR AND CREDITOR.

A DEBT may be defined as a sum of money which one person is legally bound to pay to another. We are now to consider how the property of a debtor is made available for the security and satisfaction of his creditors.

When the debtor of his own freewill hands over money or other property in satisfaction of his debt, the transfer will stand good, if it is made in good faith, and not to the injury of other creditors. But such a transfer may be set aside if it partakes of the nature of a fraudulent conveyance. If, for example, a debtor makes an assignment to a creditor of his whole property (or of the whole with only nominal exceptions) in satisfaction of a pre-existing debt, the transaction is contrary to the policy of the bankruptcy laws. The debtor's estate gains nothing by such a transfer, and the property which should be available for all creditors is unfairly made over to one.

A creditor is said to be secured when he acquires some right which makes the recovery of what is due to him more certain —some right, that is, in addition to the right of bringing an action against his debtor. Thus, if he takes from his debtor a bill of exchange or a promissary note, he calls the bill or note a security, because it confers on him the rights and remedies given by law to the holder of a negotiable instrument. Again, if a third party guarantees payment by the debtor, the creditor is so far secured; he has an additional party whom he may sue.

§ 1. *Judgment Creditors.*

A creditor who has obtained a judgment or decree against his debtor is so far secured. The debt is now matter of record; the debtor is bound to obey the orders of the court; and, if payment be still withheld, the creditor may proceed to ask for execution of the judgment. Execution against the person of the debtor was once a form of process in very general use; but since the Debtors' Act, 1869, attachment or arrest on civil process is not permitted, except when the debtor has been guilty of fraud or contempt of court. Execution, as a general rule, is against the debtor's property. The forms of process used for this purpose may be enumerated under the following heads:—

1. Execution by sequestrators. If a person is ordered to pay money into court, or to do some other act within a limited time, the judgment may be served upon him; if he refuses or neglects to obey it, the creditor may proceed to issue a writ addressed to four or more persons, who are empowered to enter on the debtor's land, etc. to collect the rents and profits thereof and his personal estate generally, and to hold the same under sequestration until he obeys the order of the court.

2. Execution by a receiver. The court may appoint a person to receive the rents and profits of the debtor's land, or the profits of a business carried on by him, for the benefit of his creditors. This is called equitable execution, because, before the Judicature Acts, it was necessary to resort to the Court of Chancery in order to obtain the appointment of a receiver.

3. Execution by the sheriff. The most ancient and best known mode of obtaining execution of a judgment is by means of a writ addressed to the sheriff of the county where the judgment debtor's property is situated. Of the writs which may be addressed to the sheriff, there are two which require special mention in this place.

A writ of *fieri facias* directs the sheriff to cause to be made of the debtor's goods and chattels the sum due and costs, with interest thereon at the statutory rate. The sheriff or his officer may seize and sell any property of the defendant included under the general name of goods; as, for example, leasehold interests in land. And when property is thus sold, the purchaser acquires an indefeasible title; the rights of the owner are extinguished, as if he had himself parted with his goods. The sheriff must make a true return to the court, setting forth that he has caused to be made the sum which he is directed to levy, or that, for some sufficient reason, he has been unable to make it.

A writ of *elegit* directs the sheriff to cause to be delivered to the judgment creditor all lands and tenements, rectories, tithes, rents, and hereditaments, including copyhold lands, situated in his bailiwick, of which the debtor is seised or possessed, or over which he has a disposing power which he may, without the assent of any other person, exercise for his own benefit[1]. On receipt of this writ, the sheriff impanels a jury to enquire of what lands, etc. the debtor is seised, and of their annual value. Upon the inquisition had, he then proceeds to deliver to the creditor all the lands, to hold until his judgment is satisfied. As we have already seen (*ante*, p. 6), the creditor thus acquires a chattel interest in the land. A term of years belonging to the debtor may either be taken at its annual value by *elegit*, or seized and sold by *fieri facias*.

A creditor who has *obtained* delivery of lands under an *elegit*, or an order for the appointment of a receiver, may proceed to register the writ or order at the Land Registry office, in accordance with the provisions of the 51 & 52 Vict. c. 51. By doing so, he makes his security effective, not

[1] Since the Bankruptcy Act, 1883, no goods may be seized by *elegit*; the operation of the writ is confined to lands.

only as against the debtor, but as against persons to whom the debtor may sell or mortgage the land. Registration does not *per se* fix such persons with notice of the judgment; but the present state of the law is such that no prudent purchaser omits to search for registered judgments, writs of execution, and orders affecting the land. By placing his execution on the register, the creditor makes it almost certain that any purchaser who takes the land will take it with notice of, and therefore subject to, his prior claim.

Besides the remedies indicated in the foregoing paragraphs, a judgment creditor may obtain an order for attaching moneys due to the debtor from third parties, or an order for charging stock, shares, etc. standing in his name[1].

§ 2. *Pawn, Lien, Mortgage.*

A judgment, then, is a security which enables a creditor, by using the proper forms of process, to obtain satisfaction out of the property of his debtor generally. There are other forms of security by which a specific part of a debtor's property is set aside to answer the claim of one particular creditor.

First, the debtor may deliver a thing, by way of security, into the possession of the creditor. A contract of pawn, for example, is completed by delivery of the chattel pawned; the pawnee acquires the right to retain possession, and the right to sell the chattel, if the debtor fails to pay the money advanced to him.

Again, the creditor may be in lawful possession of a thing belonging to the debtor, and he may have the right to retain possession until the debtor performs his engagement. This kind of security is called a lien. Where the creditor's claim

[1] For further information on this subject see the Table of Statutes, year 1838.

is founded on something done in connexion with the thing retained (as e. g. when a workman keeps possession of a thing which he has made or repaired, until his charges are paid) the lien is said to be particular. See, for example, the case of *Willoughby* v. *Westlake, ante,* p. 3. In some cases the law recognises the existence of a general lien; a creditor is permitted to retain goods of his debtor to secure the balance due to him on a general statement of accounts between himself and the debtor. General liens are not favoured by the law; but they may be created by express contract, or by an implied contract resulting from the usage of trade.

[In the case of land, a creditor may, in some cases, have what is called an 'equitable lien,' without having possession. A vendor of land, for example, who has given up possession to the purchaser, retains an equitable lien for unpaid purchase money. He may enforce his lien by obtaining an order for sale of the land, if the purchase money is not paid.]

Instead of transferring the possession of specific property to his creditor, the debtor may make a formal conveyance of specific property by way of security, retaining the right to redeem his property if he performs his engagement. This kind of security is called a mortgage.

A mortgage of land may be effected by means of a conveyance to the creditor, subject to a proviso that if the money advanced is repaid within a certain time, the creditor shall reconvey to the debtor. When the stipulated time has expired, the legal interest vested in the creditor becomes absolute; but equity preserves to the debtor his right to redeem, on payment of the principal and interest of his debt. This 'equity of redemption' is an interest in land, and, if the mortgaged estate is an estate of inheritance, the mortgagor's interest will be preserved for him and his heirs, according to the rules which apply to real estate. The legal interest vested in the mortgagee is only a security for money; on the death of

a sole mortgagee his interest devolves on his personal representatives. Conveyancing Act, 1881, s. 31[1].

So long as a mortgagor of land remains in possession, he exercises his rights of user, subject to the terms of the mortgage, and the Conveyancing Act, s. 18, enables him to grant leases, under certain conditions, if and as far as a contrary intention is not expressed in the mortgage deed.

The rights and remedies of the mortgagee are to be ascertained from the terms of his deed and from the general rules of law applying to this class of securities. In ss. 18–25 of the Conveyancing Act may be found a summary view of the powers which used commonly to be inserted in mortgage deeds: powers which are now implied by virtue of the Act, subject always to the intention of the parties, as expressed in the deed. Unless the mortgagor stipulates to the contrary, the mortgagee will have power, if his money is not paid, to sell the mortgaged property, to appoint a receiver of the income thereof, and to take other measures for obtaining the full advantage of his security. If he enters into possession, he will have the same powers of leasing as are permitted to the mortgagor in possession by s. 18.

A debtor who has mortgaged his property is not precluded from obtaining further advances by making subsequent mortgages of the same property. But a second or third mortgage is always a dangerous security, even where the value of the property greatly exceeds the amount of the debt due to the first mortgagee. In the first place the mortgagor has already parted with the legal estate. The person in whom the legal estate is vested may require the mortgagor to pay off any moneys which he has advanced on security of the property

[1] In the case of an equitable mortgage the debtor does not make a formal conveyance, but equity assumes that to be done which ought to be done. Thus an equitable mortgage of land may be made by informal memorandum, or by deposit of title-deeds. See *ante*, p. 17.

in good faith and without notice of any prior claim. For example: a third mortgagee who has advanced money without notice of the second mortgage may pay off the first mortgagee, and take a conveyance from him of the legal estate. He may then tack his third mortgage to the first, and require the mortgagor to pay them both off before he consents to reconvey the property. By the exercise of his right of tacking he thus postpones and possibly defeats the claim of the second mortgagee.

Again, a second mortgagee is placed in danger by the existence of the right of consolidation. Some prior incumbrancer (the person in whom the legal estate is vested, or another) may happen to hold a mortgage over other property belonging to the same debtor. Where this is the case, the rules of equity permit that prior incumbrancer to say to the debtor: 'You shall not redeem one of these properties unless you are also prepared to redeem the other. I keep my charge on both, by way of security for my total claim against you.' Thus, the claims of a second mortgagee of Blackacre may be postponed, because the owner has a difficulty in paying off a charge which the first mortgagee holds over Dale. This right to consolidate is taken away by s. 17 of the Conveyancing Act, but only in so far as a contrary intention does not appear in the mortgage deed. If a prior incumbrancer therefore has expressly stipulated for the right to consolidate, he may exercise that right to the prejudice of a subsequent incumbrancer.

A mortgage of chattels could be made, at common law, without any deed or writing: but the cases in which this form of security is commonly used are now governed by statutory rules.

A mortgage of goods, furniture, etc. is made by means of the formal conveyance called a bill of sale. An absolute bill of sale is simply a conveyance of the property in goods; its form and incidents are regulated by the Bills of Sale Act,

1878. A bill of sale by way of security is a mortgage of goods; its form and incidents are regulated by the Bills of Sale Act 1878 and the amending Act of 1882.

Choses in action also may be mortgaged. Policies of insurance, for example, are mortgaged by deed, or by an assignment completed by notice to the company. Shares in a company may be mortgaged by means of a formal transfer; but this is sometimes a dangerous form of security to take; for the creditor who accepts a formal transfer of shares by way of security must have his name entered as a shareholder in the company's books, and will be treated as a contributory if the company is wound up at the instance of its creditors.

§ 3. *Bankruptcy.*

An 'act of bankruptcy' is an act or default on the part of a debtor which indicates that he is unable or unwilling to pay his debts in full. This general definition covers all the particular acts of bankruptcy enumerated in s. 4 of the Bankruptcy Act, 1883. A debtor may declare himself insolvent by conveying his property in trust for creditors generally; or by filing a declaration of insolvency, or a bankruptcy petition against himself; or by giving notice that he has suspended or is about to suspend payment. He may admit himself to be insolvent, by allowing his goods to be taken in execution; or by failing to comply with the terms of a bankruptcy notice served on him by a judgment creditor. He may indicate an intention to defeat the claims of his creditors, by making a fraudulent transfer of his property or part thereof; or by creating a fraudulent preference in favour of a particular creditor; or by absenting himself or 'beginning to keep house.' All these are acts of bankruptcy.

When an act of bankruptcy is committed, any creditor whose claim amounts to £50 may present a petition, asking that a 'receiving order' may be made in respect of the

debtor's estate. When the order is made, the Official Receiver becomes receiver of all property to which the debtor is entitled as beneficial owner. If the creditors meet and appoint a trustee, the property is transferred to and vests in the trustee, for the purpose of being divided among the creditors.

A secured creditor (i.e. a creditor holding a mortgage, charge, or lien on the debtor's property or any part thereof) is admitted to petition; but he must either give up his security for the benefit of creditors generally; or he must estimate the value of his security and petition in respect of the balance due to him, after deducting the value so estimated. It is to be observed that the term 'security' is sometimes used to describe instruments which do not confer on the holder any mortgage, charge, or lien. A bill of exchange, for example, is only a personal engagement, and the holder is not, as such, a secured creditor within the meaning of the Bankruptcy Act. But if the bill has been accepted payable on delivery of a bill of lading, the acceptor has a right to the goods comprised in the bill of lading; a holder of the bill is virtually pledgee of the acceptor's interest in the goods, and is therefore a secured creditor within the meaning of the Act. In like manner, a judgment creditor is not, strictly speaking, secured until he proceeds to execution and so obtains specific rights over the debtor's property or some part thereof.

§ 4. *Debts of a Deceased Person.*

When a debtor dies, all property to which he is beneficially entitled is assets for the payment of his debts.

Under the name of legal assets we include all property which vests in the executor or administrator by virtue of his office. Such assets must be applied with due regard to the legal priorities of different claimants. The order in which

debts are paid out of legal assets is as follows. 1. Debts due to the Crown by record or specialty. 2. Debts to which priority is given by statute: as, for example, the claim of a Friendly Society against the estate of a deceased officer. 3. Judgments against the deceased debtor, if duly registered. Priority is also given to a creditor who obtains judgment against the executor or administrator; and these judgments do not require registration. 4. Recognisances enrolled. 5. Debts by specialty (i.e. debts contracted under seal); simple contract debts; and unregistered judgments against the deceased[1]. 6. Bonds, i.e. obligations under seal to pay money, not given or assigned for value. A voluntary bond is good, of course, as against the obligor; but in administering his estate it is postponed to claims founded on valuable consideration.

Under the name of equitable assets we include property which does not vest in the executor or administrator *virtute officii*, but may be made available for payment of debts with the aid of a court of equity. Out of equitable assets debts are paid *pari passu*, without regard to the priorities mentioned in the preceding paragraph.

If a testator devises his land in trust for payment of his debts, the trustee is bound to see that the *cestuis que trusteat* (the creditors) obtain the benefit of the trust. Lands so devised are equitable assets.

Again, if a testator charges his real estate with payment of his debts, he makes his land equitable assets. The creditors must, if necessary, take steps to obtain satisfaction out of lands so charged; for in this case the devisee of the lands is not affected by any trust.

Lands not charged with or devised subject to payment of debts are made equitable assets by the 3 & 4 Will. IV. c. 104.

[1] Specialty debts were formerly preferred to simple contract debts; but this priority was taken away by the 32 and 33 Vict. c. 46.

It appears, then, that all the property of a deceased debtor has been made accessible to his creditors. And a creditor may seek satisfaction either from the personal representative or from the heir or devisee to whom the lands of his debtor have come. But the rights of the real and personal representation, *as between themselves,* are determined by rules which prescribe the order in which assets are to be applied in payment of debts. The order is as follows:—

1. Personal estate, not disposed of in the way of legacies. The 'general personal estate,' unless expressly exonerated, is the fund out of which debts are *primâ facie* payable.

2. Real estate devised or ordered to be sold for payment of debts. If the personal estate be expressly exonerated, real estate of this description will be the property first resorted to.

3. Real estate which has descended to the heir. The heir comes in by operation of law, and not because the deceased had any purpose to benefit him; therefore we make land descended liable for debts before resorting to land given by way of bounty.

4. Real estate devised, but charged with payment of debts.

5. Personal property bequeathed in the form of general legacies.

6. Real estate specifically devised and personal estate specifically bequeathed, each contributing rateably. (A residuary devise is specific in its nature, as was explained in Chapter XI.)

7. Real and personal property over which the deceased has exercised a general power of appointment.

If a person taking any part of the property of the deceased is made liable out of his turn, he will have a right to redress. If, for example, the heir is sued by a creditor, although the general personal estate is sufficient for the payment of all debts, equity will 'marshal' the assets of the deceased by ordering the heir to be recouped out of the personal estate.

The rules as to priority of debts, marshalling of assets, etc. are now less important than they were; for if the estate of a deceased person is insufficient for the payment of his debts, s. 10 of the Judicature Act, 1875, directs that in the administration of his assets the bankruptcy rules as to secured and unsecured creditors, as to debts and liabilities provable, and as to valuation of annuities and future or contingent liabilities are to apply. And the Bankruptcy Act, s. 125, enables a creditor to present a petition in bankruptcy against the estate of a deceased debtor. When a person against whom a bankruptcy petition has been presented dies, the proceedings, unless the court otherwise orders, are continued as if he were alive.

It has been stated (*ante*, p. 116) that when a thing specifically bequeathed has been made subject to a charge, the legatee may require the executor to pay off the charge. A similar rule was formerly applied in the case of mortgaged land. The heir or devisee could require the personal representative to pay the mortgage debt out of the general personal estate. But since 1854 the land is deemed primarily liable for mortgage debts with which it is charged, every part, according to its value, bearing a proportionate part of the mortgage debt, unless a contrary intention has been signified by the deceased, by will or deed or other document: Locke King's Act, 17 & 18 Vict. c. 113. A general direction for payment of debts out of personalty is not a declaration of a 'contrary intention' within the meaning of the Act. There must be words expressly or by necessary implication referring to mortgage debts charged on the real estate. 30 & 31 Vict. c. 69.

TABLE OF CASES.

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Ackroyd *v.* Smithson (conversion).
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Webb *v.* Bird (right to air).
Westlake, *in re*, (possession).
Wood *v.* Leadbitter (trespass and breach of contract).

TABLE

OF

THE MOST IMPORTANT STATUTES RELATING TO PROPERTY.

1285. The 13 Ed. I. *De Donis Conditionalibus* cuts down a fee simple on condition to a fee tail. Barring entail, by fine or recovery, afterwards permitted in spite of the statute.

1290. The 18 Ed. I. *Quia Emptores* recognises the right of a freeholder to alienate, but forbids him to create sub-tenure between himself and alienee in fee simple.

1536. The Statute of Uses, 27 Hen. VIII. c. 10, annexes the lawful seisin of hereditaments to the interest of *cestui que use.* A wife having jointure shall not have dower; but if jointure be made after marriage wife may refuse it and demand dower.

The Statute of Inrolments, 27 Hen. VIII. c. 16, requires a bargain and sale to be enrolled.

1542 and **1547.** Acts passed declaring the policy of the law as to superstitious uses.

1571. The 13 Eliz. c. 5 enables creditors to avoid any alienation which they can show to be a fraud on them.

1584. By 27 Eliz. c. 4 voluntary alienations of land are made void against purchasers for value.

1603. 'Charity' defined by 43 Eliz. c. 4.

1623. Actions of trover, etc. limited by the 21 Jac. I. c. 16.

1661. The military tenures, oppressively used by Charles I, abolished by the 12 Car. II. c. 24. All freeholds to be held in socage.

1670. Intestate succession to personalty fixed by the 22 and 23 Car. II. c. 10, an Act modelled on the 118th Novel of Justinian: supplemented by the 1 Jac. II. c. 17, which enacts that the mother, brothers and sisters are to share equally.

1677. The Statute of Frauds, 29 Car. II. c. 3, requires written evidence of creation of estates greater than estate at will; leases,

with certain exceptions; contracts for sale of interest in land; declaration of trusts of land, etc.

1707. Reversioners, etc. protected, by 6 Anne, c. 72, against tenants holding over after death of *cestui que vie*.

1730. Landlords protected by 4 Geo. II. c. 28 against tenants holding over after expiry of lease: further protected, in 1737, by 11 Geo. II. c. 19, against tenants giving notice to quit and not giving up possession.

1800. The Thellusson Act, 39 & 40 Geo. III. c. 98, restricts accumulation of income.

1830. Appointment of the Real Property Commissioners whose successive Reports led to many changes in the law.

In the same year, by the 11 Geo. IV. & 1 Will. IV. c. 47, repealing and re-enacting the Statute of Fraudulent Devises of 3 & 4 W. & M., lands devised were made subject to the claims of specialty creditors of the deceased. Soon after, by the 3 and 4 Will. IV. c. 104, lands were made equitable assets; but a preference was still given to specialty creditors. This preference was taken away in 1869.

1832. The Prescription Act, 2 & 3 Will. IV. c. 71, fixes the period of enjoyment which gives title to easements and profits; mode of computing the periods fixed; and what amounts to interruption of enjoyment.

1833. The new Statute of Limitation, 3 & 4 Will. IV. c. 27, sets a limit to actions for recovery of land, etc. This Act is now to be read as one with the Real Property Limitation Act, 1874, which reduced the time within which action may be brought.

The Fines and Recoveries Act, c. 74 of the same session, abolished these forms of assurance, and substituted a deed enrolled as the form for barring entails, and a deed acknowledged for conveying real property of married women.

The Dower Act (same session, c. 105) extended dower to equitable estates; but enabled the husband to bar the right by a simple declaration, or by disposing of the property.

The Inheritance Act (same session, c. 106) directed descent to be traced from last purchaser, etc.

1837. The Wills Act, 1 Vict. c. 26, defines liberty of devise and bequest; forms with which wills are made and revoked; rules for construction, etc. Amended as to signature in 1852 by 15 & 16 Vict. c. 24.

1838. The 1 & 2 Vict. c. 110 restricts remedies against person of debtor, regulates execution against property. By *elegit* all lands may be delivered in execution: judgment not a charge, as against

purchasers unless registered: [since 23 July, 1860, not a charge unless writ of execution issued and registered: since 29 July, 1864, not unless land actually delivered in (legal or equitable) execution]. By *fieri facias* money, notes, bills, bonds, etc. may be seized in execution.

1841. By 4 & 5 Vict. c. 35 Tithe Commissioners to be Copyhold Commissioners [now Board of Agriculture]. Regulation of copyhold tenure and facilities for enfranchisement. Act amended, 1843 and 1844: in 1852, by 15 and 16 Vict. c. 51, tenants and lords enabled to compel enfranchisement. Right to compel extended by Copyhold Act, 1858.

1845. By the 8 & 9 Vict. c. 106 the immediate freehold of land may be disposed of by deed. Feoffment, lease (if required to be in writing), assignment, surrender, etc. to be made by deed. Feoffment not to have tortious operation. Contingent remainder not to fail by forfeiture, etc. of particular estate.

The Satisfied Terms Act (same session, c. 112) provides that satisfied terms becoming attendant shall cease.

1847. Trustee Relief Act enabling trustees to take directions of the court, etc. The Trustee Act 1850 empowers the court to appoint trustees, and vest the property in them, in certain cases.

1854. The 17 & 18 Vict. c. 113 makes mortgage debts a charge primarily on land of deceased debtor. Amended and explained by Act of 1867.

1859. Lord St. Leonards' Act, 22 & 23 Vict. c. 35, makes sundry changes in the law. Leases: licence to do act which would create forfeiture restricted to act permitted: so of partial licences. Rent-charge or judgment: land charged may be released in part. Powers: mode of executing: power to sell land given to devisees in trust for payment of debts or legacies, etc. Inheritance: failure of heir of purchaser. Purchasers of land: protection against Crown debts not registered. Trustees and Executors protected: executor may apply assets after giving notice to creditors: trustee, etc. may take opinion of the Court.

1860. By 23 & 24 Vict. c. 38 purchasers of land are protected against judgments, unless writ of execution registered. Uses to take effect by relation to seisin originally vested in person seised to uses. Protection of purchaser extended to mortgagee. Limitation of estates to recover personal estate of intestate, twenty years.

1864. Judgments entered up after passing of 27 & 28 Vict. c. 112 do not bind land unless actually delivered in execution: creditor may obtain an order for sale.

1869. Hinde Palmer's Act, 32 & 33 Vict. c. 46, takes away priority of specialty debts.

1870. Forfeiture for felony, etc. abolished by 33 & 34 Vict. c. 23. Same session, c. 35, the Apportionment Act.

1873. Law and equity harmonised by the Judicature Act, 36 & 37 Vict. c. 66: special Chancery jurisdiction as to trusts, mortgages, etc.: Assignment of choses in action.

1874. Real Property Limitation Act, 37 & 38 Vict. c. 57. Infants' Relief Act, same session, c. 62: and Vendor and Purchaser Act, c. 78. The mortgagee's right to tack, abolished by last-named Act, has since been restored.

1881. The Conveyancing Act, 44 & 45 Vict. c. 41, is intended to cheapen and simplify the transfer of property. Conveyances shortened by directing that general words, estate clause, etc. are to be implied: simplified by making technicalities unnecessary: 'heirs' not necessary to describe estate in fee: mention of heirs not necessary to bind real estate by covenant: 'grant' not necessary in deed. Leases: relief against forfeiture. Mortgages: powers of mortgagor and mortgagee. Purchases: money may be paid to solicitor having deeds. The Conveyancing Act 1882 amends the Act of 1881 in several points, and provides that purchasers, etc. searching for charges on property in the Central Office of the Supreme Court may have the search made by an officer of the Court, and obtain a certificate of the result.

1882. The Settled Land Act, 45 & 46 Vict. c. 38 (extending the policy of the Settled Estates Acts of 1856 and 1877), enables the tenant for life and other limited owners of settled land to dispose of the fee. Powers to sell, exchange, lease, etc.: directions as to application of capital money raised under the Act, protection of remaindermen and others.

Married Women's Property Act, same session, c. 75.

1883. Bankruptcy Act, 46 & 47 Vict. c. 52, regulates proceedings in bankruptcy, and operation of writ of *elegit*. The Agricultural Holdings Act, same session, c. 61, enlarges the notice to quit to which a tenant is entitled, and makes elaborate provision for compensation for improvements.

1884. The Settled Land Act, 47 & 48 Vict. c. 18, amends the Act of 1882 in several points.

The Intestates' Estates Act, same session, c. 71, regulates proceedings in regard to property claimed by the Crown.

1887. The Escheat (Procedure) Act, 50 & 51 Vict. c. 53. The Copyhold Act, same session, c. 73, provides further facilities for enfranchisement.

1888. The Mortmain and Charitable Uses Act, 51 and 52 Vict. c. 42, repeals the old Statutes and consolidates the law relating to these subjects.

The Land Charges and Registration Act, same session, c. 51, provides for the formation of a register of writs and orders affecting land, etc.

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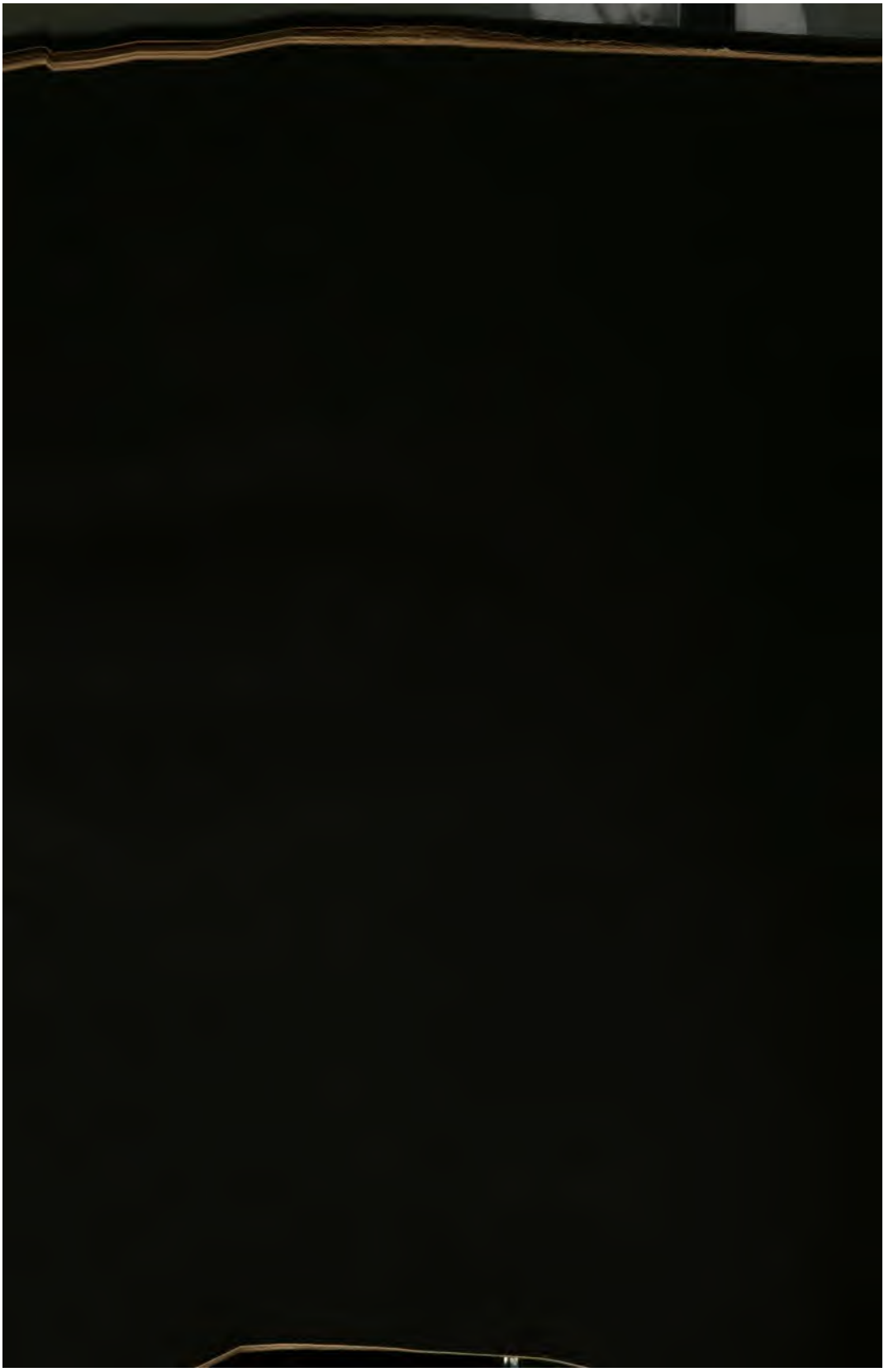
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